72-349

Supreme Court, U. S.
FILED
AUG 29 1972
MICHAEL RODAK, JR., CLERK

In The

Supreme Court of the United States

October Term 1972

No. 72-349

OLGA SCARPETTA,

Petitioner,

vs.

NICK F. DE MARTINO and JEAN DE MARTINO,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF FLORIDA

ZALK, RUBEL & PERRET
608 Fifth Avenue
New York, New York 10020

ROSENBLATT and ROEMER, P.A.
HORTON, SCHWARTZ & PERSE
66 West Flagler Street
Miami, Florida 33130

Attorneys for Petitioner

(5522) LUTZ APPELLATE PRINTERS, INC.
Law and Financial Printing

South River, N.J. (201) 257-6850 | New York, N.Y. (212) 565-6377 | Philadelphia, Pa. (215) 563-5587 | Washington, D.C. (202) 783-7288

TABLE OF CONTENTS

	Page
Statement	1
Opinions and Orders Below	2
Jurisdiction	3
Questions Presented	3
Constitutional Provisions Involved	5
Statement of the Case	6
How Federal Questions Raised	10
Reasons for Granting the Writ:	
1. The Florida courts should have given full faith and credit to the judgment of the New York courts awarding custody to petitioner.	13
2. The application of full faith and credit to "custody" orders.	16
3. The "clean hands" doctrine.	19
4. Vilation of the Due Process provisions of the Fourteenth Amendment to the Constitution.	21
Conclusion	23

Table of Citations

CASES CITED:

Finlay v. Finlay, 240 N.Y. 429, 148 N.E. 624 (1925) . . . . . .

May v. Anderson, 345 U.S. 528, 73 S. Ct. 840 (1953) 17

New York ex rel. Halvey v. Halvey, 330 U.S. 610, 67 S. Ct. 903, 91 L. Ed. 1133 (1947) 16

People ex rel. Scarpetta v. Spence-Chapin Adoption Service, 28 N.Y.2d 185, 321 N.Y.S.2d 65, 269 N.E.2d 787 (1971) . . . .

People ex rel. Scarpetta v. Spence-Chapin Adoption Service, 28 N.Y.2d 658 (1971). . .

Powell v. Powell, 242 So.2d 138 (1970) . . .

Sutton v. Leib, 342 U.S. 402, 72 S. Ct. 398, 96 L. Ed. 448 (1952) . . . . . .

Vermeulen's Petition, In Re, 114 So.2d 192 (1959) . . . . . .

Wise v. Berman, 282 F. Supp. 282 (1967). . .

Contents

	Page
UNITED STATES CONSTITUTION CITED:	
Article IV, Section 1	5
Fourteenth Amendment, Section 1	5
STATUTE CITED:	
28 U.S.C. Section 1257(3)	3

APPENDIX

A — Decision of the Supreme Court of Florida, June 2, 1972	1a
B — The Opinion of the District Court of Florida, Third Circuit	2a
C — Decision of the Circuit Court of the 11th Judicial Circuit in and for Dade County, Florida, June 22, 1971. . . .	5a
C-1 — Final Judgment of Circuit Court, 11th Judicial Circuit in and for Dade County, Florida, June 24, 1971. .	6a
D — Opinion of Court of Appeals of the State of New York	7a
E — Opinion by Appellate Division, First Department	25a

F — Decision of Ascione, J.S.C. 1

G — Order and Judgment 3

H — Order of the Supreme Court of the State of New York, New York County, May 27, 1971 5

I — Order of the United States Supreme Court, October 12, 1971 5

J — Domestic Relations Law, State of New York 5

K — Order and Judgment Appealed From, November 20, 1970 6

L — Stipulation Staying Enforcement of Judgment, November 19, 1970 7

M — Request for Leave to Intervene 8

N — Petition for Writ of Habeas Corpus. . . 9

O — Return of Writ of Habeas Corpus and Answer and Response to Writ and Petition 11

P — Portions of Petitioner's Brief to the District Court of Appeal, Third District, Florida 12

Q — Portions of Petition for Rehearing or Suggestion for Certification 13

Contents

		Page
R	Portions of Petition for Writ of Certiorari to the District Court of Appeal, Third District	64a
S	Portions of Petition for Rehearing to Supreme Court of Florida	66a
T	The Florida Habeas Corpus Statute	68a
U	Florida Social Welfare Statute	68a
V	Social Services Law of the State of New York	70a
W	Portions of Domestic Relations Law, State of New York	71a

IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1972

No.

- -x

OLGA SCARPETTA,

Petitioner,

v.

NICK F. DE MARTINO and
JEAN DE MARTINO,

Respondents.

- -x

Petition for a Writ of Certiorari to the Supreme Court of the State of Florida

To the Chief Justice and the Associate Justices of the Supreme Court of the United States of America:

Your petitioner, Olga Scarpetta, hereby petitions this Honorable Court for a Writ of Certiorari to the Supreme Court of the State of Florida to review the order denying the petition for a rehearing and for a writ of certiorari in a habeas corpus proceeding.

Opinions and Orders Below

The decision of the Supreme Court of Florida (Appendix A,1a, infra) without opinion, is reported at 262 So.2d 442. The opinion of the District Court of Appeal of Florida, Third District (Appendix B, 2a, infra) is reported at 254 So.2d 813. The decision and judgment of the Circuit Court of the 11th Judicial Circuit in and for Dade County, Florida, is unreported (Appendix C, 5a, infra; Appendix C-1, 6a, infra).

The opinion of the Court of Appeals of the State of New York in the case of Scarpetta v. Spence-Chapin Adoption Service is reported at 28 N.Y.2d 185, 321 N.Y.S.2d 68, 269 N.E.2d 787 (1971). See Appendix D, 7a, infra. The opinion of the Appellate Division of the Supreme Court of the State of New York, First Department, is reported at 36 A.D.2d 524, 317 N.Y.S.2d 928 (Appendix E, 23a, infra). The opinion of the Supreme Court of the State of New York, New York County, of November 16, 1970 is not officially reported. It is set forth as Appendix F, 25a, infra.

On April 28, 1971, an unreported order and judgment were entered in the Supreme Court of the State of New York, New York County, directing that Spence-Chapin Adoption Service and the respondents, Nick F. De Martino and Jean De Martino, surrender petitioner's daughter to her on May 3, 1971 at Supreme Court, New York County (Appendix G, 31a, infra). An unreported order of May 27, 1971 in Supreme Court, New York County, adjudged respondents in contempt for their failure to return petitioner's daughter to the

temporary custody of the Spence-Chapin Adoption Service, subject to further order of the New York Supreme Court (Appendix H, 33a, infra).

Respondents appealed to the Supreme Court of the United States at the October Term, 1970, Number 1720, from those portions of the orders of the Court of Appeals of the State of New York which denied respondents leave to intervene as parties in the appeal pending before the New York Court of Appeals by the Spence-Chapin Adoption Service. On October 12, 1971, the Supreme Court of the United States, in an unreported opinion, dismissed the appeal for want of jurisdiction, and treating the papers on which the appeal was taken as a petition for a writ of certiorari, denied certiorari (Appendix I, 37a, infra).

Jurisdiction

The order of the Supreme Court of Florida denying a petition for rehearing was entered on June 2, 1972 (Appendix A, 1a, infra). This petition for certiorari was filed less than 90 days from said date. The jurisdiction of this Court is invoked under U.S. Sup. Ct. Rule 19, Sec. 1(b), 28 U.S.C.A. and 28 U.S.C.A., Section 1257(3).

Questions Presented

1. Are the Florida courts required to give full faith and credit to the final judgment of the New York courts that the petitioner had successfully revoked a document given to the adoption agency consenting to the adoption of her baby, and that she was entitled to custody of her child as against prospective adoptive parents with whom the adoption agency had placed the child?

2. Are the Florida courts required to give full faith and credit to a final determination by the New York courts that the petitioner was fit, competent and able to duly support and educate her child and that the best interests of the child required that custody be given to petitioner as the natural mother?

3. Are Florida's courts required to give full faith and credit to a final determination of the New York courts that the respondents, as prospective adoptive parents, did not have legal custody of the infant, and that the arrangement with the adoption agency conveyed no vested rights in the said child to the respondents as prospective adoptive parents?

4. Are the Florida courts required to give full faith and credit to the final judgment of the New York courts that had ordered a change of custody from the adoption agency, which had been vested with legal custody, to the petitioner?

5. Are the Florida courts required to give full faith and credit to a final determination by the New York courts that the best interests of petitioner's baby required the return of said child to petitioner, where there was no showing of change of circumstances other than the removal of the said child from the State of New York to the State of Florida, or of unfitness of petitioner as natural mother?

6. Should the respondents benefit from their wrong-doing in abducting petitioner's child from the State of New York and fleeing to Florida

after decisions awarding custody to petitioner were rendered, and when respondents were in contempt of a court order directing the return of her child to petitioner?

7. As between petitioner, the natural parent of the infant child, and respondents, who are strangers to the child and who never adopted the child, was petitioner deprived of due process of law in violation of the Fourteenth Amendment of the Constitution of the United States by having custody of her child placed in respondents by the Florida courts without any showing of unfitness of petitioner?

Constitutional Provisions Involved

Constitution of the United States, Article IV, Section 1.

> "Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof."

Constitution of the United States, Amendment XIV, Section 1.

> "... No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person

of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Statement of the Case

Petitioner, Olga Scarpetta, gave birth to an out-of-wedlock daughter on May 18, 1970 in New York City. Petitioner, 32 years of age, was unmarried and had become pregnant in her native Colombia. Four days after the birth of her daughter, petitioner placed the infant for boarding care with the Spence-Chapin Adoption Service in New York City, an agency authorized to receive children for adoption. About June 1, 1970, a surrender document consenting to the placement for adoption of petitioner's child was executed by petitioner to the agency, and on June 18, 1970 the baby was placed by the agency with the respondents for the purpose of adoption. Five days later, on June 23, 1970, the petitioner requested of the agency that her child be returned to her.

Pursuant to the provisions of the Domestic Relations Law of the State of New York (Appendix J, 38a, infra), petitioner did not know with whom her child had been placed. The respondents, on June 18, 1970, were residents of Brooklyn, New York, and respondent, Nick F. De Martino, was a practicing attorney in the City and State of New York.

After unsuccessful attempts to regain her child from the agency, petitioner commenced a

habeas corpus proceeding in the Supreme Court of the State of New York against the adoption agency. The New York Supreme Court, after considering all the facts, found petitioner's surrender revocable and concluded that the child should forthwith be returned to petitioner, her natural mother (Appendix F, 27a, infra). By its order and judgment of November 20, 1970 (Appendix K, 42a, infra), the trial Court ordered the return of the petitioner's daughter to petitioner, but this order was stayed pending appeal to the Appellate Division of the State of New York, First Department.

By stipulation dated November 19, 1970 (Appendix L, 44a, infra), the attorneys for petitioner, and for Spence-Chapin Adoption Service, had consented to the entry of the judgment directing the return of her child to petitioner, and staying this judgment pending appeal, on the condition that such appeal be perfected for the next available term of the Appellate Division.

The Appellate Division of the New York Supreme Court unanimously affirmed the lower court ruling on January 28, 1971, supra (Appendix E, 25a, infra). Spence-Chapin Adoption Service sought leave to appeal to the Court of Appeals of the State of New York, and for a stay pending the appeal, which was granted by the New York Court of Appeals order of February 18, 1971.

The respondents herein, Nick F. De Martino and Jean De Martino, had requested of the Court of Appeals of the State of New York leave to intervene as parties on the appeal of the Spence-

Chapin Adoption Service. This request was denied with permission to file a brief amici curiae, 28 N.Y.2d 658, (Appendix M, at 46a, infra). A stay signed by a Judge of the Court of Appeals of the State of New York continued in full force and effect under the order of the Court of Appeals of February 18, 1971, and petitioner's baby remained with the respondents.

On April 8, 1971, the New York Court of Appeals unanimously affirmed the decision of the Appellate Division of the Supreme Court of the State of New York, 28 N.Y.2d 185, 321 N.Y.S.2d 68, 269 N.E.2d 787, (Appendix D, 7a, infra).

On the day following the decision of the Court of Appeals of the State of New York, respondents fled New York with petitioner's child to the State of Florida in the Miami area.

On April 8, 1971, the day of the New York Court of Appeals decision, the respondents herein, Nick F. De Martino and Jean De Martino, commenced an action in the United States District Court for the Southern District of New York against the petitioner herein, Olga Scarpetta, and Spence-Chapin Adoption Service for a declaratory judgment that respondents were entitled to notice of all proceedings in which the right to custody of petitioner's daughter was involved, and that petitioner and the Spence-Chapin Adoption Service be enjoined from enforcing the order and judgment of the Supreme Court, New York County, entered on November 24, 1970, directing that custody of her child be awarded to petitioner.

Because of stays contained in the temporary restraining order, and subsequent orders of the Federal courts, it was not until April 28, 1971 that an order and judgment were entered in the Supreme Court of the State of New York, New York County, directing that Spence-Chapin Adoption Service and the respondents, Nick F. De Martino and Jean De Martino, surrender petitioner's infant daughter to her on May 3, 1971 in the Supreme Court, New York County (Appendix G, 31a infra). Petitioner's daughter was not surrendered to her on that date, and a motion was made in New York Supreme Court to punish the respondents for contempt.

By order of May 27, 1971, a copy of which is attached hereto in Appendix H, at 33a, infra, the respondents were adjudged in contempt.

As soon as the petitioner, Olga Scarpetta, learned the whereabouts of the respondents, she instituted habeas corpus proceedings in the Circuit Court of the 11th Judicial Circuit, in and for Dade County, Florida. The first hearing on the said writ of habeas corpus was held on June 11, 1971, and was concluded on June 22, 1971. The trial judge denied the writ, and directed that custody of the child remain with respondents (Appendix C-1, at 6a, infra). The Third District Court of Appeals of Florida affirmed the decision of the trial Court (Appendix B, at 2a, infra), and the Supreme Court of Florida denied petitioner's petition for a writ of certiorari, and petition for a rehearing on June 2, 1972 (Appendix A, at 1a, infra).

How Federal Questions Raised

The full faith and credit question was first raised by the pleadings in the Circuit Court of the 11th Judicial Circuit, in and for Dade County, Florida, by petitioner's petition for a writ of habeas corpus (Appendix N, at 47a, infra).

Paragraph 3 of the said petition alleges in part that the Court of Appeals of the State of New York, as well as lower New York State courts, have recognized the petitioner as the natural mother of Lenore, and had determined that petitioner is entitled to legal custody of her child. Paragraph 16 of respondents' return to the Florida writ of habeas corpus (Appendix O, at 49a, infra), states that the New York proceedings are not entitled to full faith and credit, since the child's welfare at the time of the issuance of the writ is the sole consideration, and that matters dealing with the custody of children under the laws of this state are not entitled to full faith and credit, nor is a foreign custody decree entitled to such consideration.

The trial court denied the petition for the writ of habeas corpus, and granted custody of petitioner's infant daughter to the respondents.

The full faith and credit question was again raised by petitioner in her brief to the District Court of Appeals of Florida, Third District, portions of which are attached (Appendix P, at 58a, infra).

The opinion of the District Court of Appeal of Florida, Third District, is included at Appendix B, at 2a, infra. On petitioner's petition for a

rehearing, or suggestion for certification, the full faith and credit question was again raised (Appendix Q, at 61a, infra). That petition was denied.

The full faith and credit question was again raised in petitioner's petition for a writ of certiorari in the Supreme Court of the State of Florida, and the petition was denied (Appendix R, at 64a, infra).

On the petition for rehearing in the Supreme Court of Florida, the full faith and credit question was again raised and denied. The petition for rehearing is reproduced in part in Appendix S, at 66a, infra.

The Supreme Court of Florida denied the petition for a rehearing (Appendix A, at 1a, infra).

The question of due process of law, i.e., the denial of custody of a child to its natural mother where there is no finding of unfitness, was raised in the Circuit Court of the 11th Judicial Circuit, in and for Dade County, Florida, the trial court in the State of Florida, in the motion for rehearing, in paragraph 2 of said motion, as follows:

> "The Court erred in granting custody to respondents, whose possession of the child is entirely illegal, and who showed neither a relevant change of circumstances since the New York decree, nor that petitioner, the natural mother, is in any way unfit to have custody of the child."

As stated above, the trial court denied the petition for the writ of habeas corpus, and awarded custody of petitioner's infant daughter to the respondents (Appendix C, at 5a, infra).

The due process of law question was raised again in the Circuit Court of the 11th Judicial Circuit, in and for Dade County, Florida, on June 29, 1971 when the attorney for the petitioner argued his request for a rehearing. In the course of this argument he stated in part:

> "Now, I remind this Court that Miss Scarpetta's fitness and her rescission of the consent are res judicata in New York. These decisions of the New York Court are without question entitled to full faith and credit. As a matter of law the general law of this State, and of every state in the union, is that as long as the mother is fit it is presumed that the best interests of the child is with its mother.... With respect to the fitness, with respect to the type of person that Miss Scarpetta is, she is a college graduate, who has a very responsible job with a vast international corporation. She speaks three languages; and her work history has been that of helping others, teaching, advising. She has a degree, and she has expertise in the social sciences, she is financially secure, she is able to care for the baby. She has credit towards a Master's degree; and, as a matter of fact, the De Martinos and their attorneys have not really questioned in any way her fitness."

The trial judge denied the petition for rehearing.

Reasons for Granting the Writ

1. The Florida courts should have given full faith and credit to the judgment of the New York courts awarding custody to petitioner.

Habeas corpus proceedings in Florida are governed by statute. The writ is to be granted when a person is "detained in custody without lawful authority" (F.S.A. Section 79.01, Appendix T, at 68a, infra). Petitioner introduced in evidence certified copies of the orders and judgments of the New York courts. The Court of Appeals of the State of New York had decided under Section 383 of the Social Services Law (Appendix V, at 70a, infra) that petitioner had properly revoked her consent to adoption, and that she was fit, competent and able to duly maintain, educate and support her child, and that it was in the best interests of the child that custody be in the petitioner (People ex rel. Scarpetta, 28 N.Y.2d 185, 321 N.Y.S.2d 65, 269 N.E.2d 787, Appendix D, at 7a, infra). The decision that petitioner could revoke the consent to adoption, which had been granted to the Spence-Chapin Adoption Service in New York (hereinafter Spence-Chapin) was a final order and judgment of the highest court of the State of New York, and should have been given full faith and credit under Article Four of the United States Constitution, Section 1.

The custody of petitioner's infant daughter, after petitioner had signed a consent to adoption for Spence-Chapin, was in Spence-Chapin. Spence-

Chapin, on June 18, 1970, placed petitioner's baby with the respondents for the purpose of adoption. Petitioner's infant daughter was never adopted by respondents because of the timely revocation of consent by petitioner. See Section 112, Domestic Relations Law, State of New York, Appendix W, at 71a, infra.

On November 20, 1970, when the Supreme Court of the State of New York, New York County, decided that petitioner had properly revoked her consent to adoption, that she was fit, competent and able to support, maintain and educate her child, and that she was entitled to custody of her child, as opposed to Spence-Chapin, any temporary or provisional right to custody that respondents might have had from Spence-Chapin terminated (Appendices F and K, at 27a, 42a, infra).

The New York Supreme Court's order and judgment of November 20, 1970, contained a stay of the direction that Spence-Chapin surrender petitioner's infant daughter, who at that time was six months old, pending the determination of the appeal to the Appellate Division, on condition that the appeal be made promptly. This stay was based upon a stipulation between the attorneys for petitioner and for Spence-Chapin, for the benefit of the infant (see Appendix L, at 44a, infra). A judge of the New York Court of Appeals issued an additional stay pending the determination by the Court of Appeals, but this was not on consent.

When the Court of Appeals on April 8, 1971 affirmed the lower court decisions that petitioner

was entitled to custody of her child, respondents had absolutely no right of custody, and any previous provisional custody rights they may have had from Spence-Chapin had terminated. Therefore, when respondents fled New York with petitioner's infant daughter and arrived in Florida, they had no legal right to custody in the State of Florida.

Under the State of Florida habeas corpus statute, the writ is to be granted when "a person is detained in custody without lawful authority" (see Appendix T, at 68a, infra). Since there was a decision from the highest court of the State of New York deciding this very issue, respondents had no legal right to petitioner's daughter.

There could be no question that the respondents were detaining petitioner's infant daughter without lawful authority. The New York courts had determined that respondents had no right to intervene in the proceedings between petitioner and Spence-Chapin Adoption Service, and that they had no standing in court. This determination also was final and should have been given full faith and credit by the Florida courts. (See People ex rel. Scarpetta v. Spence-Chapin Adoption Service, 28 N.Y.2d, Appendix M, at 46a, infra.)

When the decision of the New York Court of Appeals was appealed to the United States Supreme Court by respondents, the Supreme Court, by its order of October 12, 1971, dismissed the appeal for want of jurisdiction, and treating the papers as a petition for a writ of certiorari, denied certiorari (Appendix I, at 37a, infra).

The Circuit Court Judge at the habeas corpus hearing in the Circuit Court of the 11th Judicial Circuit, in and for Dade County, Florida, permitted respondents to go into the question of the welfare of petitioner's child. In denying the writ of habeas corpus filed by petitioner against respondents, he refused to give full faith and credit to the New York judgments on the legality of detention by respondents, in violation of the full faith and credit provision of the United States Constitution.

The stated purpose of the full faith and credit clause of the United States Constitution is to avoid relitigation in other states of adjudicated issues.

See Sutton v. Leib, 342 U.S. 402, 72 S. Ct. 398, 96 L. Ed. 448 (1952) and Wise v. Berman, 282 F. Supp. 282 (1967).

2. The application of full faith and credit to "custody" orders.

The Florida District Court of Appeals, Third District, justified its refusal to give full faith and credit to the judgments and orders of the New York courts by stating "A child custody order of a sister state is not entitled to full faith and credit, but may be given great weight under the doctrine of comity," citing New York ex rel. Halvey v. Halvey, 330 U.S. 610, 67 S. Ct. 903, 91 L. Ed. 1133 (1947), and other cases.

But the "custody question" in the instant case is different from the custody question that arises

on separation or divorce of parents. Where there is a separation or divorce, each of the parents has an equal right to custody of the child. There is no basis to decide between the parents. Therefore the state as parens patriae determines the custody on the basis of the welfare of the child. (Finlay v. Finlay, 240 N.Y. 429, 148 N.E. 624, 1925.)

The best interests of the child, and the child's welfare, may change with circumstances. Therefore, most states do not regard a decree of custody between parents as final.

In Halvey v. Halvey, supra, the United States Supreme Court upheld a New York modification of a Florida decree granting absolute custody to the mother on the ground that, in Florida, custody decrees between parents are subject to modification, not only because of change of circumstances since the decree, but also because of facts not before the Court at the time of the decree. But as was pointed out above, in the instant case the New York decree determining the validity of revocation of consent to adoption and the finding that the mother was fit, competent and able to duly maintain, educate and support her child, was final.

In May v. Anderson, 345 U.S. 528, 73 S. Ct. 840 (1953), the United States Supreme Court found that Ohio was not bound by the result of a Wisconsin grant of custody to the father because there was no in personam jurisdiction over the mother. However, in the instant case, unlike May v. Anderson, only the mother had rights, far more precious than property rights. The

parties that had an interest in the case, petitioner and the adoption agency, were within the court's jurisdiction. The New York Court of Appeals had decided respondents could not intervene and had no vested rights in the child's custody (Appendix M, at 46a, infra.)

The "best interests of the child" rule is not applicable here because that rule applies only between contending parents, or custody contests between persons who claim the right of custody from parents. The present case is a contest between a parent, who has been determined to be a fit parent and able to maintain, educate and support her child, and non-parents, whom the New York courts held had no standing.

It has been argued above that denial of full faith and credit because of change of circumstances is not applicable to a contest between a parent and non-parents. But even if the "change of circumstances" test were to be applied, in the present case there could be no change of circumstances to avoid applicability of "full faith and credit." See Powell v. Powell, Fla. App. 1970, 242 So.2d 138; In re: Vermeulen's Petition, Fla. App. 1959, 114 So.2d 192.

The New York Supreme Court judgment referred to sustained the writ, and directed the Spence-Chapin Adoption Service to surrender to the petitioner, Olga Scarpetta, her baby (Appendix K, at 42a, infra). At the time of that order of November 20, 1970, custody of petitioner's daughter, as has been pointed out previously, was with the Spence-Chapin Adoption Service.

There was never any consent that custody remain with the respondents. The stipulation referred to by the Florida District Court of Appeal, Third District, in its decision on the application for a rehearing (Appendix B, at 2a, infra), did not provide that custody remain with the respondents. It provided for a stay of the judgment that custody of the infant be transferred from Spence-Chapin to petitioner (Appendix L, at 44a, infra).

The Court of Appeals decision sustaining the revocation of consent to adoption was handed down on April 8, 1971 (Appendix D, infra). The New York Supreme Court order directing Spence-Chapin and the respondents to return her baby to petitioner was dated April 28, 1971 (Appendix G, infra). The New York County Supreme Court order holding the respondents in contempt for failure to return petitioner's child was dated May 27, 1971 (Appendix H, infra). Petitioner commenced habeas corpus proceedings in Florida on June 10, 1971 with the first hearing held on June 11, 1971. The decision of the Florida court discharging the writ of habeas corpus came on June 22, 1971. There was no finding of change of circumstances in the period from May 28, 1971 to June 22, 1971, or from April 8, 1971 to June 22, 1971. There could therefor be no basis even under the custody decisions applicable between parents for a change of the New York custody decree on the basis of a change of circumstances.

3. The "clean hands" doctrine.

It is clear from the facts of this case that the respondents deliberately fled from New York

to Florida with petitioner's child for the purpose of avoiding the judgments and orders of the New York courts directing the Spence-Chapin Adoption Service and the respondents to return the child to petitioner.

By commencing an action in the United States Southern District Court of New York, with appeals to the Circuit Court of Appeals for the Second Circuit, and to the Supreme Court of the United States, respondents were able to continue stays in effect long after the initial determination of November 16, 1970 that petitioner should have custody of her child.

Respondents then argued that because 13 months had passed, and the baby had grown used to respondents, that it would be detrimental to petitioner's baby to send her back to her mother. But the passage of time was caused by the appeals in New York taken by the Spence-Chapin Adoption Service, the federal action by the respondents, the flight to Florida and the appeals after the habeas corpus proceeding was promptly brought by petitioner in Florida.

The decisions of the Florida courts have rewarded the respondents for their misconduct. To allow the respondents to prevail under the facts of the case would be a frustration of the basic policies of full faith and credit. It is a clear announcement that self-help is preferable to the judicial process in custody cases. Fear of encouraging abductions was the basis of the dissents by Justices Jackson and Reed in May v. Anderson, supra. To allow respondents to prevail in the

current situation is to encourage similar conduct by other parties to custody suits. If "full faith and credit" is not allowed to prevail, what is to prevent respondents, or others similarly situated, from running from one state to another.

4. Violation of the Due Process provisions of the Fourteenth Amendment to the Constitution.

Section 1 of the Fourteenth Amendment states in part, "Nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

The effect of the decrees of the Florida courts was to transfer custody of petitioner's baby from its natural mother to the respondents. This was a determination made, not on the basis of the unfitness of the natural mother, but solely on the basis of the court's finding that the baby would be better off with respondents. Actually, the determination by Judge Cullen in the Circuit Court of the 11th Judicial Circuit, in and for Dade County, Florida, did not refer to the "best interests" rule, but stated merely that under all the facts of the case the writ of habeas corpus should be denied. (See Appendix C, C-1, infra.) There was no finding that petitioner was unfit. The respondents appeared in the Florida court with no colorable claim to petitioner's baby, except that the baby had been in their possession for 13 months. Whatever legal rights to the baby they may previously have had were based on a consent to adoption which had been given to the Spence-Chapin Adoption Service. These

legal rights, whatever their nature, were dissolved by the action of the New York courts in upholding the revocation of petitioner's consent to adoption. Nevertheless, the Florida courts found respondents custody of the baby proper.

However, even the Florida courts do not allow the removal of a child from its mother except for "improper guardianship, including abandoned, neglected and abused children" (F.S.A. 409.145, Appendix U, at 68a, infra). The Florida habeas corpus statute (Appendix T, infra), as interpreted by the courts of Florida in the instant case, permits a child to be removed from its mother on a showing of "best interests of the child" while removal of a child from a Florida citizen would require "improper guardianship," which has been interpreted to mean unfitness of the mother. Such a result is inconsistent with equal protection of the law and due process under the Fourteenth Amendment.

Conclusion

For the foregoing reasons a Writ of Certiorari should issue to review the judgment and opinion of the Florida Supreme Court on the grounds that the findings of the New York courts are entitled to full faith and credit, and that petitioner has been deprived of due process of law.

Respectfully submitted,

ZALK, RUBEL & PERRET

By s/ Joseph Zalk

ROSENBLATT and ROEMER, P.A.
HORTON, SCHWARTZ & PERSE

Attorneys for Petitioner

Appendix A - Decision of the Supreme Court of Florida

IN THE
SUPREME COURT OF FLORIDA
JANUARY TERM, A.D. 1972
FRIDAY, JUNE 2, 1972

OLGA SCARPETTA,

Petitioner,

vs.

NICK F. DeMARTINO and JEAN DeMARTINO,

Respondents.

Case No. 41,916

On consideration of the Petition for Rehearing filed by attorneys for Petitioner, and the Reply thereto,

IT IS ORDERED by the Court that said Petition be, and the same is hereby, denied.

Roberts, C.J., Ervin, Boyd and Dekle, JJ., Concur

McCain, J., Dissents

cc: Hon. W. P. Carter, Clerk
Hon. E. B. Leatherman, Clerk
A True Copy Messrs. Podhurst, Orseck & Parks
Messrs. Zalk, Rubel & Perrett and

Decision

TEST: Rosenblatt & Roemer and Horton, Schwartz & Perse
Messrs. Colson & Hicks

Sid J. White
Clerk Supreme Court

By s/_____
Deputy Clerk

(I have today mailed to the Clerk of the District Court of Appeal, Third District, Order of April 25, 1972.)

Appendix B - The Opinion of the District Court of Appeals of Florida, Third Circuit

254 So.2d 813

No. 71-745

[Same Title]

September 28, 1971

Rehearing Denied, November 30, 1971.

Habeas corpus proceeding to obtain custody of child on ground that defendants had illegal custody. The Circuit Court, Dade County, Ralph O. Cullen, J., denied petition, and petitioner appealed. The District Court of Appeal held that evidence supported ruling that best interests and welfare of child would be served by leaving her custody with defendants.

Affirmed.

* * *

Before Swann, C.J., and Pearson and Barkdull, JJ.

Per Curiam.

Olga Scarpetta filed a petition for writ of habeas corpus against Nick F. and Jean DeMartino alleging they had illegal custody of her minor child, Lenore, and she prayed for custody of Lenore. Appropriate pleadings were filed and a hearing held. The parties appeared, testimony was taken, and the petition was thereafter denied. She has appealed.

This appears to be one of those tragic situations in which one of two innocent parties must suffer. We do not attempt to assess fault or blame to either party.

We have carefully reviewed the record and briefs prepared by able counsel. The parties agree that a child custody order of a sister state is not entitled to full faith and credit but may be given great weight under the doctrine of comity. See New York ex rel. Halvey v. Halvey, 330 U.S. 610, 67 S. Ct. 903, 91 L. Ed. 1133 (1947); Powell v. Powell, Fla. App. 1971, 242 So.2d 138; Mirras v. Mirras, Fla. App. 1967, 202 So.2d 887; Fox v. Fox, Fla. App. 1965, 179 So.2d 103; State ex rel. Fox v. Webster, Fla. App. 1963, 151 So.2d

14; Avery v. Heermance, Fla. App. 1962, 138 So. 2d 775; Foster v. Sharpe, Fla. App. 1959, 114 So.2d 373; Bachman v. Mejias, 1 N.Y.2d 575, 154 N.Y.S.2d 903, 136 N.E.2d 866 (1956); Annot., 35 A.L.R.3d 520, 561; and Ehrenzweig, Interstate Recognition of Custody Decrees, 51 Mich. L. Review, 345, 352 (1953).

We have and do give great weight and respect to the orders of sister states but we conclude, under the circumstances of this case, that the trial judge followed proper procedure and law in ruling that the best interests and welfare of Lenore were served by leaving her custody with the appellees. There is sufficient, competent and substantial evidence in the record on appeal to affirm his ruling. See Arnd't v. Prose, Fla. 1957, 94 So.2d 818; Fielding v. Highsmith, 152 Fla. 837, 13 So.2d 208 (1943); State ex rel. Weaver v. Hamans, 118 Fla. 230, 159 So. 31 (1935); Hancock v. Dupree, 100 Fla. 617, 129 So. 822 (1930); Witt v. Burford, 84 Fla. 201, 93 So. 186 (1922); McKinney v. Weeks, Fla. App. 1961, 130 So.2d 310; and 15 Fla. Jur. Habeas Corpus §62.

The order appealed herein is, therefore,

Affirmed.

ON REHEARING DENIED

Appellant has filed a vigorous and well-reasoned petition for rehearing.

Opinion

We point out that the change in circumstances and passage of time giving rise to the relationship between the baby, Lenore, and the DeMartinos occurred in great part because of appellant's consent, through her New York attorneys, that the custody of Lenore remain with the DeMartinos during the pendency of certain New York legal proceedings.

The petition for rehearing, having been considered, is denied. See Robertson v. Bass, Fla. 1906, 52 Fla. 420, 42 So. 243; and Crane v. Hayes, Fla. 1971, 253 So.2d 435.

Appendix C - Decision of the Circuit Court of the 11th Judicial Circuit in and for Dade County, Florida

Many eminent jurists have written eloquent opinions involving the same issues we have here which I could refer to. I will not.

In consideration of all the evidence in the case and the law of this state, I am constrained to the conclusion that after all is said and done, analyzing everything, that the petition should be denied and the writ discharged.

Appendix C-1 - Final Judgment

IN THE CIRCUIT COURT OF THE 11th JUDICIAL CIRCUIT IN AND FOR DADE COUNTY, FLORIDA

No. H.C. 3597

[Same Title]

This cause having come on to be heard upon the Petition for Writ of Habeas Corpus and return thereto, and the Court having heard and considered the evidence at the trial herein, it is

CONSIDERED, ORDERED and ADJUDGED that:

The Petition for Writ of Habeas Corpus be and the same is hereby denied and the Writ heretofore issued be and the same is hereby denied. Custody of the infant child, Lenore, be and the same is hereby remanded to the Respondents.

DONE and ORDERED in Chambers, at Miami, Dade County, Florida, this 24th day of June, 1971.

RALPH O. CULLEN
CIRCUIT COURT JUDGE

Appendix D - Opinion of the Court of Appeals State of New York

STATE OF NEW YORK
COURT OF APPEALS

---

1. No. 79. 71

The People &c., ex rel. Olga Scarpetta on behalf of Baby Scarpetta,

Respondent,

vs.

Spence-Chapin Adoption Service,

Appellant.

JASEN, J.:

This appeal involves the return of an out-of-wedlock infant to its natural mother after she had executed a purported surrender of the child to an authorized adoption agency. The case does not involve the undoing of an adoption or the return of an adopted child to its natural parent. Nor does the case involve the undoing of a surrender by the natural mother on her mere say-so, but rather the undoing is based on a finding of fact that for various reasons, some obvious, the surrender was not made by her with such stability of

mind and emotion that the surrender should not be undone for improvidence. On the other hand, there is not the slightest suggestion that the adoption agency was unfair or guilty of any overreaching in obtaining the surrender.

It is or should be obvious that the surrender of a child by its parent, whatever the circumstances or reason, has elements of tragedy in it and that pain, feelings of guilt, and suffering will not be avoided whatever course is taken. And, of course, the foster parents who hope to adopt the child are necessarily touched by the tragedy, guiltless and otherwise uninvolved though they be, if perchance the child is wrested from them on the annulling of a surrender.

A further consideration turns on this court's limited power of review. Where, as here, findings of fact are affirmed by the Appellate Division in a civil matter, the court is bound, by constitutional mandates, to accept those facts. Only questions of law are left for its review. As a consequence, any findings of fact involved in the rendering of the surrender, turning on the mother's then state of mind, or on her fitness to rear her child, are before this court as immutable premises, from which it may only start its review of the applicable questions of law.

Opinion

The infant child was born on May 18, 1970, to Olga Scarpetta, who was unmarried and thirty-two years old. She had become pregnant in her native Colombia by a married Colombian in the summer of 1969. Seeking to minimize the shame of an out-of-wedlock child to herself and her family, Miss Scarpetta came to New York for the purpose of having her child. She was well acquainted with this country and its language. She had had her early schooling in New Jersey and her college education in California. Indeed, she had been trained in the social sciences.

Four days after the birth of the child, she placed the infant for boarding care with Spence-Chapin Adoption Service, an agency authorized by statute to receive children for adoption. Ten days later, a surrender document was executed by Miss Scarpetta to the agency, and on June 18, 1970, the baby was placed with a family for adoption. Five days later, on June 23, 1970, the mother repented her actions and requested that the child be returned to her.

After several unsuccessful attempts to regain her child from the agency, the mother commenced this habeas corpus proceeding. Before the surrender, the mother had had a number of interviews with representatives of the adoption agency.

On the other hand, shortly before or after the birth of the child, her family in Colombia, well-to-do, and devout in their religion, were shocked that she should put out her child for adoption by strangers. They assured her of their support and backing and urged her to raise her own child.

Special Term, "after considering all the facts", concluded "that the child should be forthwith returned to petitioner, its natural mother". Following unanimous affirmance by the Appellate Division, we granted leave to appeal.

The resolution of the issue of whether or not a mother, who has surrendered her child to an authorized adoption agency, may regain the child's custody, has received various treatment by the legislatures and courts in the United States.[1] At one extreme, several jurisdictions adhere to the rule that the parent has an absolute right to

---

[1] See, Katz, Law of Adoption, 51 Geo. L.J. 64, 87; Comment, Revocation of Parental Consent to Adoption: Legal Doctrine and Social Policy, 28 U. Chi. L. Rev. 564.

regain custody of her child prior to the final adoption decree.[2] On the other hand, some jurisdictions adhere to the rule that the parent's surrender is final, absent fraud or duress.[3] The majority of the jurisdictions, however, place the parent's right to regain custody within the discretion of the court[4] -- the position which,

---

[2] See e.g., In re Baby Girl Larson, 252 Minn. 490, but cf. Minn. Stat. § 259.24[6], [1967]; S. D. Code tit. 14, § 14.0406[1939]. In North Carolina and Tennessee, the right is continuous up until a certain period of time before the issuance of the final decree. (N.C. Gen. Stat., § 48-11 [1966]; Tenn. Code Ann., §36-117 [1962].)

[3] See, e.g., Catholic Charities v. Harper (161 Tex. 21); Gonzales v. Toma (330 Mich. 35); La. Rev. Stat. Ann. tit. 9, § 404 (1965).

[4] See, Katz (supra), n. 1 at 88.

of course, our legislature has taken. The discretionary rule allows the court leeway to approve a revocation of the surrender when the facts of the individual case warrant it and avoids the obvious dangers posed by the rigidity of the extreme positions.[5]

In New York, a surrender executed by a mother, in which she voluntarily consents to a change of guardianship and custody to an authorized agency for the purpose of adoption, is expressly sanctioned by law. (Social Services Law, §384).[6]

---

5 See, Katz (supra), n.1 at 89-90; Clarke, Social Legislation, 320 [2d ed., 1957); U.S. Children's Bureau, Essentials of Adoption Law and Procedure 14 (Publication No. 331, 1949).

6 The agency is charged thereafter with the care and supervision of the child, unless the child is adopted. (Social Services Law, §383[2]; see, People ex rel. Anonymous v. Perkins Adoption Society, 271 App. Div. 672, 674.)

The statute nowhere endows a surrender with irrevocability foreclosing a mother from applying to the court to restore custody of the child to her. In fact, the legislation is clear that, until there has been an actual adoption[7], or the agency has met the requirements of the Social Services Law §384[4])[8], the surrender remains under, and subject to, judicial supervision.

---

[7]Domestic Relations Law, section 112(6) provides: "Where the adoptive child is less than eighteen years of age, no order of adoption shall be made until such child has resided with the adoptive parents for at least six months unless the judge or surrogate in his discretion shall dispense with such period of residence and shall recite in the order the reason for such action."

[8]Social Services Law, section 384: "4. Upon petition by an authorized agency, a surrogate or judge of the family court may approve such surrender, on such notice to such persons as the surrogate or judge may in his discretion prescribe. No person who has received such notice and been afforded an opportunity to be heard may challenge the validity of a surrender approved pursuant to this subdivision in any other proceeding. However, this subdivision shall not be deemed to require approval of a surrender by a surrogate or judge for such surrender to be valid."

Opinion

Inherent to judicial supervision of surrenders is the recognition that documents of surrender are unilateral, not contracts or deeds, and are almost always executed under circumstances which may cast doubt upon their voluntariness or on understanding of the consequences of their execution. Indeed, no one could reasonably urge that the legislature enact a statute or that a court decide that the natural mother be prevented from establishing that her surrender was not the voluntary act of a competent person. Of necessity, therefore, there is always an issue about the fact of surrender, document or no document. On the other hand, the courts have the strongest obligation not to permit surrenders to be undone except for the weightiest reasons. And, to reflect such a view, "the legislature has gone to great pains to circumscribe, in connection with adoption, the rights of parents who have surrendered their child to an authorized agency, and * * * has gone to equal pains to define their rights to custody prior to adoption. The related statutes, which are at least presumptively an embodiment of the social judgment and consequence of the community, form a well integrated, compact and uncomplicated procedure, which bears the impress of careful thought and intelligent planning." (People ex rel. Grament v. Free Synagogue Child Adoption Committee, 194 Misc. 332, 336.)

Opinion

Having the power to direct a change of custody from the agency back to the natural parent, notwithstanding the document of surrender, the court should exercise it only when it determines "that the interest of such child will be promoted thereby and that such parent is fit, competent and able to duly maintain, support and educate such child." (Social Services Law, § 393[1].)[9]

---

[9] Social Services Law, section 383(1):

"The parent of a child remanded or committed to an authorized agency shall not be entitled to the custody thereof, except upon consent of the court, public board, commission, or official responsible for the commitment of such child, or in pursuance of an order of a court or judicial officer of competent jurisdiction, determining that the interest of such child will be promoted thereby and that such parent is fit, competent and able to duly maintain, support and educate such child. The name of such child shall not be changed while in the custody of an authorized agency."

Accordingly, the sole issue before us on this appeal is whether there is any evidence in the record to establish that the interest of the child will be promoted by returning the child to the natural mother.

It has repeatedly been determined, insofar as the best interests of the child are concerned, that "[t]he mother or father has a right to the care and custody of a child, superior to that of all others, unless he or she has abandoned that right or is proved unfit to assume the duties and privileges of parenthood." (People ex rel. Kropp v. Shepsky, 305 N. Y. 465, 468; see, People ex rel. Anonymous v. Anonymous, 10 N Y 2d 332, 335; People ex rel. Portnoy v. Strasser, 303 N. Y. 539, 542; People ex rel. Beaudoin v. Beaudoin, 193 N. Y. 611, affg. 126 App. Div. 505; Matter of Livingston, 151 App. Div. 1, 7; cf. Matter of Gustow, 220 N. Y. 373.) It has been well said that "the status of a natural parent" is so important that in determining the best interests of the child, it may counter-balance, even outweigh, superior material and cultural advantages which may be afforded by adoptive parents * * * * For experience teaches that a mother's love is one factor which will endure, possibly endure

after other claimed material advantages and emotional attachments may have proven transient." (People ex rel. Grament v. Free Synagogue Child Adoption Committee, supra, at 337, 338.) And, indeed, as recently as 1963, the legislature expressed its approval of this "decisional rule that between parent and non-parent, the parent is preferred." (Report of Joint Legislative Committe on Matrimonial and Family Laws [1963], Leg. Doc. No. 34, p. 91.)

The primacy of status thus accorded the natural parent is not materially altered or diminished by the mere fact of surrender under the statute, although it is a factor to be considered by the court. To hold, as the agency suggests -- that a surrender to an authorized adoption agency constitutes, as a matter of law, an abandonment -- would frustrate the policy underlying our legislation (Social Services Law, § 383[1]), which allows a mother to regain custody of her child, notwithstanding the surrender to the agency, provided, of course, that there is some showing of improvidence in the making of the surrender, that the interest of such child will be promoted and "that such parent is fit, competent and able to duly maintain, support and educate such child." Nor do we perceive any distinction, in principle, between

the effect of a surrender to an authorized agency and of a surrender to an individual. "The policy urged that, if surrender may be undone, authorized agencies will be inconvenienced or even frustrated in their placement of children is not a sufficient counterweight. The fact of relationship between a natural parent and child ought not to be subordinated to such considerations, important as they are." (People ex rel. Anonymous v. N. Y. Foundling Hosp., 17 A D 2d 122, 125, affd. 12 N Y 2d 863.)

Consequently, to give the fundamental principle meaning and vitality, we have explicitly declared that "[e]xcept where a nonparent has obtained legal and permanent custody of a child by adoption, guardianship or otherwise, he who would take or withhold a child from mother or father must sustain the burden of establishing that the parent is unfit and that the child's welfare compels awarding its custody to the nonparent." (People ex rel. Kropp v. Shepsky,

supra, at 469.)[10] In determining fitness, it is obvious that a mother who is "a drunkard, an incompetent, a notoriously immoral person, cruel or unkind towards [her] child" (Matter of Gustow, 220 N. Y. 373, 377), or whose conduct evinces indifference or irresponsibility (Matter of Cleaves, 6 A D 2d 138) would not be a proper

---

10 And, in our later decision in People ex rel. Anonymous v. Anonymous (supra, at 335), we rote, in like fashion, that "where the contest for the custody of a child is between parent and nonparent, 'the primacy of parental rights may not be ignored' (People ex rel. Kropp v. Shepsky, 305 N. Y. 465, 469, supra), but it has never been held or suggested that the child's welfare may ever be forgotten or disregarded. In other words, the law presumes that it is in the child's best interests that he be raised by his natural parent, but this presumption fails when it is proved that the parent has abandoned the child or is not fit to rear him. 'The mother or father has a right to the care and custody of a child, superior to that of all others, unless', we pointed out in the Kropp case (305 N. Y. at 468), 'he or she has abandoned that right or is proved unfit to assume the duties and privileges of parenthood."

person to assume the duties of motherhood. Another significant factor to be considered is the "motivation of the mother in seeking return of the child. It is recognized that very often there is a substantial risk of improper motivation. In such case the authorized agency and the court must be especially alert not to permit the improper motivation to endanger the interests of the child or lead to any other noxious consequence. As important as this factor is, however, it is also true that the change of mind by a natural mother is not an evil thing. Instead, the change of mind is to be accorded great sympathy, and, in a proper case, encouragement and favorable action." (People ex rel. Anonymous v. N. Y. Foundling Hosp., supra.)

In no case, however, may a contest between a parent and nonparent resolve itself into a simple factual issue as to which affords the better surroundings, or as to which party is better equipped to raise the child. (People ex rel. Portnoy v. Strasser, 303 N. Y. 539.) It may well be that the prospective adoptive parents would afford a child some material advantages over and beyond what the natural mother may be able to furnish, but these advantages, passing and

transient as they are, cannot outweigh a mother's tender care and love unless it is clearly established that she is unfit to assume the duties and privileges of parenthood.

We conclude that the record before us supports the finding by the courts below that the surrender was improvident and that the child's best interest -- moral and temporal -- will be best served by its return to the natural mother.

Within twenty-three days after the child had been given over to the agency, and only five days after the prospective adoptive parents had gained provisional custody of the child, the mother sought its return. If the matter had been resolved at that time, much heartache and distress would have been avoided. However, since the child was not returned, the mother had no alternative but to commence legal proceedings to regain its custody, and this she did without delay.

In revoking the surrender and directing the return of the child to the mother, the trial court held that the mother was "motivated solely by her concern for the well-being of her child." Moreover, the evidence fully supports the conclusion that the mother "has adequately stabilized her own relationship and has become stable

enough in her own mind to warrant the return of the child to her." No finding of present or prospective unfitness has been made against the mother. On the contrary, the record discloses that she is well educated, financially secure, and in a position to properly assume the care, training and education of her child.

Concluding as we do that the record supports the determination that the child's interests will be promoted by the award of its custody to the mother, we turn to the remaining issue of whether the prospective adoptive parents were entitled to intervene in this proceeding, as a matter of law, pursuant to CPLR 1012(a)(2).

It cannot be doubted that the public policy of our state is contrary to the disclosure of the names and identities of the natural parents and prospective adoptive parents to each other.[11] Sections 383 and 384 of the Social Services Law are also reflective of this settled public policy. Since the relationship under section 384 is exclusively between the parent or parents

---

[11] See, e.g., sections 111(4) and 112(4) of the Domestic Relations Law.

and the adoption agency, and the legislature has not deemed it appropriate for the prospective adoptive parents to be parties to the proceeding pursuant to section 383, the agency acts as an insulating intermediary, ensuring by the separation of the natural parents and prospective adoptive parents the secrecy necessary to prevent the strife and harassment that could be caused by a parent who institutes a proceeding merely to learn the identify of the prospective adoptive parents.

To allow the prospective adoptive parents to intervene as a matter of right, thereby assuming all the rights of other parties to the action, would necessarily lead to disclosure of the names of the natural parents and prospective adoptive parents to each other. In view of the statutory scheme enacted by the legislature, and the settled public policy, we are unwilling to hold that the prospective adoptive parents are entitled to intervene.

Similarly, we find no merit to the contention that the failure to allow the prospective adoptive parents to intervene in the instant proceeding deprived them of due process of law so as to render the court's determination awarding custody of the child to the

Opinion

mother, constitutionally invalid. The prospective adoptive parents do not have legal custody of the baby. Spence-Chapin, the adoption agency, by virtue of the mother's surrender, was vested with legal custody. (Social Services Law, §383[2]; see also, Matter of Jewish Child Care Assn. 5 N Y 2d 222, 225.) The agency, in turn, had placed the baby with the prospective adoptive parents pursuant to an arrangement reached between them, for the purpose of prospective adoption of the child. This arrangement is of course, subject to our adoption statutes, and in no ways conveys any vested rights in the child to the prospective adoptive parents. (See, e.g., Domestic Relations Law, §§112, 114.) It follows, therefore, that, in not being permitted to intervene, they are not deprived of a protected interest, as contemplated by the Constitution.

The order of the Appellate Division should be affirmed, without costs.

* * * * * * * * * * *

Order affirmed, without costs. Opinion by Jasen,J. All concur.

Appendix E - Opinion by Appellate Division, First Department

Capozzoli, J.P., McGivern, Markewich, Nunez, JJ.

3088

- -x

THE STATE OF NEW YORK, ex rel.
OLGA SCARPETTA on behalf of
BABY SCARPETTA,

Petitioner-Respondent,

-against-

SPENCE-CHAPIN ADOPTION SERVICE,

Respondent-Appellant.

- -x

Order and judgment (one paper), Supreme Court, New York County (Ascione, J.), entered on November 24, 1970, which granted petitioner-respondent's application for custody of the infant born to her on May 18, 1970, unanimously affirmed, without costs and without disbursements. This disposition must be confined in its effect to the case immediately before us. While the circumstances evoke utmost sympathy for the proposed adoptive parents, this petitioner acted without delay—indeed, about three weeks after surrender of the child for adoption (Sec. 384 subd. 1[c] Social Services Law)—by applying to respondent agency, offering to demonstrate, as she did later at Special Term, "that the interests of such child will be promoted thereby and that such parent is fit, competent and

Opinion

able to duly maintain, support and educate such child" (Sec. 383 SSL). (See discussion of this problem: People ex rel. Doe v. Edwards, 31 A.D. 2d 64, aff'd 23 N.Y.2d 925; Matter of Roe v. N.Y. Foundling Hosp., 33 A.D.2d 83; People ex rel. Anon. v. N.Y. Foundling Hosp., 17 A.D.2d 122, aff'd 12 N.Y.2d 863.) In short, as in all such cases, the welfare and interests of the child are the paramount consideration. "... [A]n authorized agency has a special obligation, completely reviewable by the courts, to consider an early change of mind by the surrendering parent with the most circumspect sympathy and consideration. The policy urged that, if surrender may be undone, authorized agencies will be inconvenienced or even frustrated in their placement of children is not a sufficient counterweight." (People ex rel. Anon. v. N.Y. Foundling Hosp., supra, at 125.)

Appendix F - Decision of Ascione, J. S. C.

SUPREME COURT

NEW YORK COUNTY

SPECIAL TERM—PART XII

Index No. 34102/1970

THE STATE OF NEW YORK, *ex rel.* OLGA SCARPETTA, on behalf of BABY SCARPETTA,

Petitioner,

—against—

SPENCE-CHAPIN ADOPTION SERVICE,

Respondent.

ASCIONE, J.:

Petitioner is an unwed mother who came to this country from South America for the prime purpose of having her child delivered here secretly, refusing a proffered abortion, and without the knowledge of her parents or sisters as to her pregnancy.

Upon contacting a hospital in New York County, she was referred to the respondent, Spence-Chapin Adoption Service. After quite a few conferences with the respondent, she agreed to give up the expected child for adoption.

The child was born on May 18, 1970, and the petitioner voluntarily surrendered her to the respondent, first by authorizing the child's placement in a foster home for boarding care on May 22, 1970, when she physically de-

livered the child to respondent, and on June 1, by executing a formal surrender, with a present consent to any future adoption.

The infant was then placed in a foster home on June 18, with a view toward subsequent adoption.

The petitioner repented her actions and, since June 23, has consistently tried to reclaim her baby, but the respondent has refused to return the child, indicating that it would resist her attempts to do so. There is no evidence that the prospective adoptive parents were notified.

The petitioner is 32 years of age, from a well-to-do family, having studied in universities here and abroad. She is employed in New York City, with a take-home pay of more than $100 weekly. Further, she has informed all the members of her family of her plight and she will now have the assistance and help of her family. An old and trusted family employee will come to this country to care for the child while petitioner is at work.

She alleges that during the period prior to and at the time she surrendered the child, she was despondent, confused and ashamed. She had not confided the moral lapse to her parents prior to the birth, fearful she would break her parents' hearts. Children, regardless of age and sophistry, do not realize that parents' hearts do not break easily. They are cut quite often, but do heal.

The issue here is not whether the petitioner can rescind the surrender of her child, but whether the child's best interests are served by its return to its natural mother (Social Service Law § 383; Peo. ex rel. Doe v. Edwards, 31 A D 2d 64, aff'd 23 N Y 2d 925) rather than with prospec-

tive adoptive parents (both of whom are professional people, with another adopted child).

Much has been said of motherly love. " • • • a fullness of love for the child; a totality of dedication to it, an all-embracing consecration that knows no wavering, no swerving. This is a mother's gift, for which, society holds, a child may well count all the world well lost." (Peo. ex rel. Gramert v. Free Synagogue, etc., 194 Misc. 332, 344.)

While it is true that the overwhelming majority of adoptive parents give of their love, many problems beset an adopted child. The knowledge of the adoption, oft-times garnered through the thoughtless cruelty of pre-teen friends, the constant subsequent mental turmoil seeking reasons for their abandonment, the curiosity concerning the natural parents and possible brothers or sisters, and at times the search.

The Court is aware of the excellently performed task of the respondent, Spence-Chapin Adoption Service, in their matching ability and their sincere efforts to find suitable and compatible homes for the adoptees, but it does appear that they acted in undue haste in the placement of the one-month-old child in this instance. The mother had indicated her revocation quite timely and consistently.

In other cases, the lack of timeliness or consistency had been a detrimental factor for the mother. (Peo. ex rel. Doe v. Edwards, 31 A D 2d 64, aff'd 23 N Y 2d 925; Peo. ex rel. Roe v. New York Foundling Hospital, 33 A D 2d 83.)

Decision

The record in this case sufficiently shows that petitioner has adequately stabilized her own relationships and has become stable enough in her own mind to warrant the return of the child to her. It appears that petitioner is motivated solely by her concern for the well-being of her child. It appears that petitioner is fit, competent and able to duly maintain, support and educate the child.

This Court suggests that if respondent desires to appeal it, do so as expeditiously as possible in order not to increase the sorrows of the prospective adoptive parents, who have had the infant through this five-month period when the infant is so ingratiating with recognitions, smiles and chuckles. In all probability, if they had known that the mother wanted the child, they would have voluntarily returned the baby.

After considering all the facts, the Court is of the opinion that the child should be forthwith returned to petitioner, its natural mother.

Settle Judgment.

Dated, November 16, 1970.

ALFRED M. ASCIONE
J.S.C.

Appendix B - Order and Judgment

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

[Same Title]

SPENCE-CHAPIN ADOPTION SERVICE, the respondent above named, having appealed to the Court of Appeals from an order of the Appellate Division, First Department, entered in the office of the Clerk of the Appellate Division on January 28, 1971, which order affirmed an order and judgment of the Supreme Court, New York County, entered in the office of the Clerk of the County of New York on November 24, 1970, sustaining the petitioner's writ of habeas corpus, and directing that the respondent SPENCE-CHAPIN ADOPTION SERVICE surrender to the petitioner OLGA SCARPETTA the infant BABY SCARPETTA; and the Court of Appeals having, by an order entered in the office of the Clerk of said Court of Appeals on April 7, 1971, affirmed the said order of the Appellate Division without costs; and the remittitur of the Court of Appeals having been duly filed herein;

NOW, on motion of Zalk, Rubel & Perret, attorneys for the petitioner herein, it is

ORDERED, ADJUDGED AND DECREED that the respondent SPENCE-CHAPIN ADOPTION SERVICE and NICK F. DeMARTINO and JEAN DeMARTINO, the persons with whom the infant BABY SCARPETTA presently resides, surrender to the petitioner OLGA SCARPETTA said infant BABY SCARPETTA, on May 3rd, 1971 at 10:00

Order and Judgment

A.M. in Special Term, Part XII, Supreme Court, New York County, 60 Centre Street, New York, New York.

E N T E R,

s/ Alfred M. Ascione
J.S.C.

NORMAN GOODMAN
Clerk

F I L E D
APR 28, 1971
Co. Clerk's Office
New York

Appendix H - Order

At a Special Term, Part XII of the Supreme Court of the State of New York, held in and for the County of New York, at the Courthouse thereof, 60 Centre Street, New York, New York on May 27th, 1971.

P R E S E N T:

CHARLES A. LORETO,
Justice.

[Same Title]

The Petitioner, having moved this Court by an order to show cause granted May 6, 1971 and returnable May 11, 1971, and by a supplementary order to show cause granted May 7, 1971 returnable May 13, 1971, for an order punishing NICK F. DE MARTINO and JEAN DE MARTINO for contempt for their wilfull disobediance of, and non-compliance with, the order and judgment of Mr. Justice Alfred M. Ascione, made November 20, 1970 and entered November 24, 1970, ordering that respondent SPENCE-CHAPIN ADOPTION SERVICE surrender to the petitioner OLGA SCARPETTA, the infant BABY SCARPETTA, and the order and judgment of Mr. Justice Alfred M. Ascione, made and entered April 28, 1971, directing that the respondent SPENCE-CHAPIN ADOPTION SERVICE and NICK F. DE MARTINO and JEAN DE MARTINO surrender the infant, BABY SCARPETTA, to the petitioner, OLGA SCARPETTA, on May 3, 1971 at 10:00 A.M. in

Order

Special Term, Part XII of the Supreme Court, New York County, 60 Centre Street, New York, New York, in that NICK F. DE MARTINO and JEAN DE MARTINO, the persons with whom the said BABY SCARPETTA resides, have failed to obey and violated the provisions of the said orders and judgments, and said motion having regularly come on to be heard on May 13, 1971,

NOW, on reading and filing the said orders to show cause granted May 6, 1971 and May 7, 1971, the affirmations of Joseph Zalk, one of the attorneys for the petitioner herein, dated May 6, 1971 and May 7, 1971, the orders and judgments of Mr. Justice Alfred M. Ascione dated November 20, 1970 and April 28, 1971, all submitted in support of petitioner's motion, and upon the affirmation of Jacob D. Fuchsberg, dated May 11, 1971 of Fuchsberg and Fuchsberg, the attorneys for NICK F. DE MARTINO and JEAN DE MARTINO, submitted in opposition to the said motions, and after hearing counsel for both sides, and after having been advised by Jacob D. Fuchsberg, one of the attorneys for NICK F. DE MARTINO and JEAN DE MARTINO, in Chambers on May 24, 1971, that NICK F. DE MARTINO and JEAN DE MARTINO have left the State of New York with the said BABY SCARPETTA, and their attorney stated that they are no longer domiciled in the State of New York, and their whereabouts is unknown and was not disclosed, and due deliberation having been had therein, and upon filing the written decision of the Court,

NOW, on motion of Zalk, Rubel & Perret, the attorneys for the petitioner, it is

Order

ORDERED, ADJUDGED AND DECREED that the motion to punish NICK F. DE MARTINO and JEAN DE MARTINO for contempt of Court be granted to the following extent; and it is further

ORDERED, ADJUDGED AND DECREED that NICK F. DE MARTINO and JEAN DE MARTINO shall return the said BABY SCARPETTA forthwith within forty-eight hours from the date of service as herein specified to the temporary custody of the SPENCE-CHAPIN ADOPTION SERVICE, 6 East 94th Street, New York, New York, the said BABY SCARPETTA to be held in the temporary custody of the SPENCE-CHAPIN ADOPTION SERVICE subject to the further order of this Court; and it is further

ORDERED, ADJUDGED AND DECREED that service of a copy of this order with notice of entry shall be made upon Fuchsberg & Fuchsberg, 250 Broadway, New York, New York, the last attorneys of record for NICK F. DE MARTINO and JEAN DE MARTINO, and by certified mail upon NICK F. DE MARTINO and JEAN DE MARTINO at their last known home address at 8216 10th Avenue, Brooklyn, New York and said service shall be sufficient; and it is further

ORDERED, ADJUDGED AND DECREED that upon the filing of affidavit of a party hereto or his attorney of non-compliance with the provisions of this order, the respondents hereby be adjudged guilty of contempt of this court in having wilfully disobeyed its provisions; and it is further

Order

ORDERED, ADJUDGED AND DECREED under Section 750 of the Judiciary Law of the State of New York, as punishment for said contempt, pursuant to Section 851 of said statute, the said Nick P. De Martino and Jean De Martino be imprisoned in the County Jail for a period of thirty (30) days; and it is further

ORDERED, ADJUDGED AND DECREED upon the filing of affidavit of non-compliance with the provisions of this order by said Nick F. De Martino and Jean De Martino, an order of commitment may issue ex parte to the Sheriff of any county of the State of New York or of the City of New York in which they may be found, directing the said Sheriff to detain said Nick P. De Martino and Jean De Martino in his custody in the common jail of any county, and to be kept therein until their compliance with the terms of this order, or until otherwise discharged by law.

ORDERED that this order or decree may be enforced or modified only in the Supreme Court.

E N T E R

s/ CAL
J. S. C.

s/ Norman Goodman
Clerk

Filed: May 28, 1971

Appendix I - Order of the Supreme Court
October 12,1971

OFFICE OF THE CLERK
SUPREME COURT OF THE UNITED STATES
Washington, D.C.

October 12, 1971

Leo Pfeffer, Esq.
15 East 84th St.
New York, N.Y. 10028

RE: DeMartino, et ux. v. Scarpetta and Spence-Chapin Adoption Service, No. 70-178

Dear Sir:

The Court today entered the following order in the above-entitled case:

The appeal is dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for a writ of certiorari, certiorari is denied.

Very truly yours,

E. Robert Seaver, Clerk
By s/ E. T. ??
Assistant Clerk

cc: Jacob D. Fuchsberg, Esq.
250 Broadway
New York, N.Y. 10007

Joseph Zalk, Esq.
Zalk, Rubel & Perret
200 West 57th St.
New York, N.Y. 10019

Appendix J – Domestic Relations Law - State of New York

Domestic Relations Law -- State of New York (McKinney's Consolidated Laws of New York (Book 14)).

§ 114 . Order of Adoption.

If satisfied that the moral and temporal interests of the adoptive child will be promoted thereby the judge or surrogate shall make an order approving the adoption and directing that the adoptive child shall thenceforth be regarded and treated in all respects as the child of the adoptive parents or parent. In determining whether the moral and temporal interests of the adoptive child will be promoted by the adoption, the judge or surrogate shall give due consideration to any assurance by a commissioner of social services that he will provide necessary support and maintenance for the adoptive child pursuant to the social services law. Such order shall contain the full name, date and place of birth of the child in the body thereof. If the judge or surrogate is also satisfied that there is no reasonable objection to the change of name proposed, the order shall direct that the name of the adoptive child be changed to the name stated in the agreement of adoption and that henceforth he shall be known by that name. All such

Domestic Relations Law -- State of New York (McKinney's Consolidated Laws of New York (Book 14)].

orders made by a family court judge of Westchester county since September first, nineteen hundred sixty-two, and on file in the office of the county clerk of such county shall be transferred to the clerk of the family court of such county. Such order and all the papers in the proceeding shall be filed in the office of the court granting the adoption and the order shall be entered in books which shall be kept under seal and which shall be indexed by the name of the adoptive parents and by the full original name of the child. Such order, including orders heretofore entered, shall be subject to inspection and examination only as hereinafter provided. The fact that the adoptive child was born out of wedlock shall in no case appear in such order. The written report of the investigation together with all other papers pertaining to the adoption shall be kept by the judge or surrogate as a permanent record of his court and such papers must be sealed by him and withheld from inspection. No certified copy of the order of adoption shall issue unless authorized by court order, except that certified copies may issue to the agency or agencies in the proceeding

prior to the sealing of the papers. Before the record is sealed, such order may be granted upon written ex parte application on good cause shown and upon such conditions as the court may impose. After the record is sealed, such order may be granted only upon notice as hereinafter provided for disclosure or access and inspection of records. The clerk upon request of a person or agency entitled thereto shall issue certificates of adoption which shall contain only the new name of the child and the date and place of birth of the child, the name of the adoptive parents and the date when and court where the adoption was granted, which certificate as to the facts recited therein shall have the same force and effect as a certified copy of an order of adoption.

No person, including the attorney for the adoptive parents shall disclose the surname of the child directly or indirectly to the adoptive parents except upon order of the court. No person shall be allowed access to such sealed records and order and any index thereof except upon an order of a judge or surrogate of the court in which the order was made or

of a justice of the supreme court. No order for disclosure or access and inspection shall be granted except on good cause shown and on due notice to the adoptive parents and to such additional persons as the court may direct.

In like manner as a court of general jurisdiction exercises such powers, a judge or surrogate of the court in which the order of adoption was made may open, vacate or set aside such order of adoption for fraud, newly discovered evidence or other sufficient cause. As amended L.1968, c.320, eff. Sept. 1, 1968, c.365; L1968, c.1038, § 4; L.1970, c. 570, § 6, eff. Sept. 1, 1970.

Appendix K - Order and Judgment Appealed From

At a Special Term, Part XII of the Supreme Court of the State of New York, held in and for the County of New York, at the County Courthouse in the County of New York on the 20th of November, 1970.

Present:

HON. ALFRED M. ASCIONE,

Justice.

THE STATE OF NEW YORK, *ex rel.* OLGA SCARPETTA, on behalf of BABY SCARPETTA,

Petitioner,

—against—

SPENCE-CHAPIN ADOPTION SERVICE,

Respondent.

The Writ of Habeas Corpus issued by the Honorable Arnold L. Fein, Justice of the Supreme Court of the State of New York, County of New York, on the 21st day of September, 1970, having come on for hearing at a Special Term, Part XII of this Court on the 2nd day of November, 1970, and a hearing having been held upon said Writ of Habeas Corpus on the 2nd day of November, 1970, and the Petitioner herein, having appeared herein by its attorneys, Zalk, Rubel and Perret, Joseph Zalk, Esq., of counsel, and

the Respondent herein, having appeared herein by its attorneys, Simpson Thacher & Bartlett, Roy L. Reardon, Esq., and James Wawro, Esq., of counsel, and the proofs of all parties having been taken and their respective counsels having been heard, and the Court, after due deliberation, having made and filed a decision in writing dated November 16, 1970, awarding custody of Baby Scarpetta to the Petitioner, Olga Scarpetta, from the custody of the Respondent, The Spence-Chapin Adoption Service,

AND, upon reading and filing the aforesaid Writ of Habeas Corpus, the Petition of Olga Scarpetta, sworn to September 18, 1970, and the Return of the Respondent, The Spence-Chapin Adoption Service, duly sworn to on the 27th day of October, 1970, by Loyce W. Bynum, and Petitioner's Exhibit 1 and Respondent's Exhibit A (consisting of 3 papers);

Now, upon motion of Simpson Thacher & Bartlett, attorneys for the Respondent herein, it is

ORDERED, ADJUDGED AND DECREED that the writ is sustained and Respondent The Spence-Chapin Adoption Service, surrender to the Petitioner, Olga Scarpetta, the infant, Baby Scarpetta, and it is further

ORDERED, ADJUDGED AND DECREED that the execution of this judgment be stayed pending the determination of the appeal of The Spence-Chapin Adoption Service from this judgment, to the Appellate Division, First Department, on

Order and Judgment

condition that such appeal is perfected for the next avail
able term of such Court, on consent by stipulation date
November 19, 1970.

ENT
ER,

A. M. A.
J.S.C.

NORMAN GOODMAN
Cler

FILED
Nov 24 1970
COUNTY CLERK'S OFFICE
NEW YORK

Appendix L - Stipulation Staying Enforcement of Judgment

BY HAND

November 19, 197

Re: Scarpetta v. Spence-Chapin
Index No. 34010/70

Honorable Alfred M. Ascione
Supreme Court of the State of New York
County of New York
Special Term Part XII
60 Centre Street
New York, New York

Stipulation

Dear Judge Ascione:

After fully discussing the appeal of this proceeding with our respective clients, we wish to respectfully inform you that both parties consent to the entry of the annexed judgment and the stay of this judgment pending appeal on condition that such appeal be perfected for the next available term of the Appellate Division, First Department.

Respectfully yours,

SIMPSON, THACHER & BARTLETT

By Roy L. Reardon
Attorneys for Respondent
The Spence-Chapin
Adoption Service

ZALK, RUBEL & PERRET

By Joseph Zalk
Attorneys for Petitioner
Olga Scarpetta

JW:mkb

Appendix M - Request for Leave to Intervene

THE PEOPLE OF THE STATE OF NEW YORK ex rel. OLGA SCARPETTA, on Behalf of Baby Scarpetta, Respondent, v. SPENCE-CHAPIN ADOPTION SERVICE, Appellant.

Submitted February 8, 1971; decided February 18, 1971. Reported below, 36 A.D.2d 524.

Motion by Nick F. and Jean De Martino for leave to intervene as parties on the appeal herein denied; movants, however, may file a brief amici curiae if they be so advised.

Motion by Adoptive Parents Committee, Inc. for leave to file a brief amicus curiae and to participate in the oral argument of the appeal herein granted only to the extent that a brief may be filed.

Appendix H - Petition for Writ of Habeas Corpus

IN THE CIRCUIT COURT OF THE 11th JUDICIAL CIRCUIT IN AND FOR DADE COUNTY, FLORIDA

No. H.C. 3597

- - - - - - - - - - - - - - - - -x

OLGA SCARPETTA, :

Petitioner, :

vs. :

NICK F. DeMARTINO and JEAN DeMARTINO, :

Respondents. :

- - - - - - - - - - - - - - - - -x

Comes now the Petitioner, Olga Scarpetta, by and through her undersigned attorneys, and files this her Petition for Writ of Habeas Corpus:

1. Petitioner is Olga Scarpetta, natural mother of Lenore, who was born on May 18, 1970.

2. The child is now in the illegal possession and control of the Respondents, Nick F. DeMartino and Jean DeMartino, at an unknown address in Dade County, Florida.

3. Petitioner has repeatedly demanded that Respondents surrender to her the person of her child, but Respondents have refused and still

refuse to do so. The Court of Appeals of the State of New York as well as lower New York State Courts have recognized the Petitioner as the natural mother of Lenore and have determined that she is entitled to legal custody of her child.

4. The Respondents are not related by blood to the Petitioner's child and they have never legally adopted said child. They have possession of Lenore against the wishes of the child's natural mother.

5. On or about May 1, 1971, the Respondents fled the jurisdiction of the State of New York and its Courts in order to retain illegal possession and control of the Petitioner's child.

6. The child is held and deprived of her liberty without proper legal authority. The Respondents hold, retain and assert custody of the child over the objections of the Petitioner. The custody is illegal and invalid and unless relief be granted by this Court, the child will continue to be confined and deprived of her liberty.

WHEREFORE, Petitioner prays for a Writ of Habeas Corpus commanding the Respondents, Nick F. DeMartino and Jean DeMartino, to bring the child before the Court so that lawful custody of her person be granted the Petitioner.

STANLEY ROSENBLATT and
MALLORY H. HORTON
Suite 400, Concord Building
66 West Flagler Street
Miami, Florida 33130

ZALK, RUBEL and PERRET
200 West 57th Street
New York, New York 10019

Attorneys for the Petitioner.

Appendix O - Return to Writ of Habeas Corpus and Answer and Response to Writ and Petition

IN THE CIRCUIT COURT OF THE 11th JUDICIAL CIRCUIT IN AND FOR DADE COUNTY, FLORIDA

No. H.C. 3597 (Cullen)

[Same Title]

COME NOW the respondents, NICK DE MARTINO and JEAN DE MARTINO, through undersigned counsel and file this their Return to the Writ of Habeas Corpus; and their Answer and Response to the Writ and Petition herein and aver:

1. The respondents herein lawfully and legally obtained custody of the child, Lenore, preparatory to lawful adoption in the State of New York.

Return to Writ

2. The petitioner, then a mature adult woman, 32 years of age, surrendered the person of her child Lenore, to the Spence-Chapin Adoption Agency in New York, with is principal office at 6 E. 94th Street, New York, New York.

3. The petitioner herein, the natural mother of the infant female, gave birth to said infant female, Lenore, out of wedlock, on May 18, 1970 in New York Hospital, New York, New York.

4. The petitioner on information and belief surrendered the infant to the Spence-Chapin Agency on May 22, 1970, and consented to the placement of said child for boarding care. Thereafter on June 1, 1970, the petitioner voluntarily and unconditionally surrendered the custody of said child to Spence-Chapin, with ultimate adoption of the child in mind, in accordance with the laws of the State of New York.

5. The decision to surrender the custody of the child and to actually place it for adoption was considered and maturely reflected upon and the formal surrender document was in no way executed under duress or by virtue of fraud.

6. Upon information and belief, the petitioner has not even seen the child since the time of its birth.

7. Your respondents were given custody of the child on June 18, 1970, and the child has remained with them since that time and has lived in their home and they are in loco parentis.

Return to Writ

8. The petitioner applied for a Writ of Habeas Corpus in the State of New York and reobtained custody of her child and sought to revoke the consent. That Writ was issued on September 21, 1970 and resulted in a favorable determination which proceeded through the New York court system to the New York Court of Appeals. The decision is now pending in the U.S. Supreme Court, through appellate proceedings instituted by the De Martinos.

9. The DeMartinos, your respondents, were not permitted to intervene in the cause in New York which was litigated solely between the petitioner and the Spence-Chapin Agency under the peculiar aspects of the New York law.

10. Your respondents have never been given the opportunity to be heard, nor has the welfare of the child and the best interests of the child ever been litigated or evidence thereon presented; the trial in New York in which the DeMartinos were not participants, included no testimony of the condition, physical, mental or emotional, of Lenore, or of the DeMartinos, or of the situation in their home, or of the effect on Lenore of a forced dismemberment of the only home Lenore has ever known.

11. The DeMartinos, your respondents, subsequent to the New York Court of Appeals decision, have permanently moved to the State of Florida and now reside here. In Florida the court is not bound by any technical legal right of the

parent, but must give the parent's claim only that consideration to which it is entitled under the peculiar circumstances of the case; but in a case such as this involving an infant like Lenore, the matter of the Writ is not decided on the legal right of the infant to be relieved from unlawful imprisonment and detention as in the case of an adult, but the custody of the child must be based upon the welfare of the child and the best interests of the child at the time of the Writ; the child's welfare is the supreme consideration.

12. Your respondents obtained custody lawfully and legally and have never before been afforded an opportunity to be heard concerning their right to custody which was summarily determined as to them under the New York procedures; the best interests and welfare of the child at this time and at the time of the issuance of the Writ clearly dictate that custody remain with your respondents who have provided the infant Lenore with the only home she has ever known; and your respondents are the only parents that Lenore has ever known. Your respondents contend that medical psychiatric and psychological testimony clearly will dictate that the welfare of the child Lenore mandates that custody remain where it is at this time.

13. Your respondents have at all times attempted to obtain a hearing on the merits concerning the welfare of Lenore with regard to her custody, but have been denied their day in court to this point. Indeed they instituted Federal Court proceedings in the State of New York, contending that they were

not afforded the right to be heard and that proceeding is presently pending in the U. S. Supreme Court.

14. Petitioner had a wide range of alternatives readily available to her when she surrendered the child, but Petitioner insisted upon surrendering her child after careful counseling and advice, and she voluntarily secured this alternative from the variety of choices she had.

15. The respondents have afforded the child a normal home with loving care. There is a sister, an adopted child, four years old, who likewise has formed close emotional ties with the infant Lenore. Separation at this time of Lenore from her sister as well as those whom she knows as her parents would have harsh effects upon the emotional security of the infant. The best interests of the child can only be served and enhanced by her continuing in the custody of respondents, her loving foster parents. A return of the child to the custody of the petitioner whose personal and family future is so uncertain is not in the best interests of this child. On information and belief, the petitioner has no present plans to marry, will be unable to spend her days with the child; and will require a nurse to care for the child during the day. The respondent, Jean DeMartino, on the other hand, is a loving housewife and mother who will be available to tend to the child's needs as she has done since shortly after the child's birth; and the child likewise will have the company and emotional relationship with her sis-

ter; and will have the support, guidance and training of a loving, responsible father as she has had since shortly after the time of her birth.

16. The New York proceedings are not entitled to full faith and credit since the child's welfare at the time of the issuance of the Writ is the sole consideration and matters dealing with the custody of children under the laws of this state are not entitled to full faith and credit, nor is a foreign custody decree entitled to such consideration.

17. This is particularly true where, as here, your respondents never have been afforded the opportunity to be heard nor has there been any meaningful testimony on the best welfare of the child. For all practical purposes the New York courts only considered a presumption that the welfare of the child dictated its return to the natural mother — a view which is not supported in this case by the medical, emotional psychiatric and psychological factors.

18. Moreover, conditions have changed since the Writ was granted in New York in that the child has matured and now is fully aware of its relationship with your respondents and the welfare of the child at this time clearly dictates that she remain where she is.

19. The petitioner voluntarily surrendered and abandoned the baby Lenore and your respondents only received notice that she intended to obtain custody of the infant immediately prior to the

trial on the New York petition for Writ of Habeas Corpus, on November 2, 1970. At that juncture the child was almost six months of age. The efforts of your respondents to intervene in the New York courts have been denied. Deprivation of their custody without a full hearing on the merits would deprive them of due process of law under the Fourteenth Amendment to the U. S. Constitution and the Due Process Clause of the Florida Constitution. A hearing on the best interests of the child with the DeMartinos participating will clearly reflect that the welfare of the infant demands continued custody in the De Martinos. The petitioner after over a dozen consultations with social agencies throughout her pregnancy and after being advised to consider her surrender carefully prior to consummating it, nevertheless determined to execute it and irrevocably to surrender the baby. By the time the DeMartinos became aware that she sought to revoke her surrender, the child had been with them for a period of months and the parent child emotional relationship already was well established. Custody should remain herein with the respondents who lawfully obtained that custody; the welfare of the child requires this.

WHEREFORE, the Writ of Habeas Corpus heretofore granted should be discharged and the Petition dismissed upon a full evidentiary hearing concerning the best welfare of this infant.

Response and Answer to Writ and Petition

Return to Writ

Your respondents, in response and answer to the Writ and Petition herein aver:

1. Admit on information and belief the allegations of Paragraph 1 of the Petition.

2. Deny the allegations in Paragraph 2 except admit possession and custody of the child in Dade County, Florida.

3. Deny the allegation that the petitioner has repeatedly demanded that respondents surrender the child to her; admit that the New York court system has recognized petitioner as the natural mother of Lenore; and admit that that court system thus far has determined that petitioner is entitled to legal custody of the child as between the Spence-Chapin Agency and the mother; but state that that decision is not binding upon the respondents; that they were not parties thereto; that they were not afforded the opportunity to be heard; that as to them deprivation of custody based upon the New York litigation would violate their constitutional rights under both the Federal and Florida constitutions to due process of law and the opportunity to be heard; and further deny that the New York decision is entitled to full faith and credit here or to comity consideration; in that at the present time and at all times the best welfare of the child dictates that custody remain with your respondents, an issue which was not sufficiently litigated in the New York proceedings.

Return to Writ

4. The respondents admit the allegations of Paragraph 4 that they are not related by blood to the child and have not as yet adopted said child; they likewise admit custody of Lenore against the wishes of the child's natural mother, but aver that they obtained lawful custody of the child and that the best welfare of the child requires continued custody in them; and aver that they plan to adopt said child and aver that the wishes of the natural mother-petitioner at this time are not conclusive or binding upon your respondents or Lenore.

5. Your respondents unequivocally deny the allegations of Paragraphs 5 and 6 of the Petition.

WHEREFORE it is respectfully requested that the Writ be discharged and the Petition be dismissed.

CLAIM OF RESPONDENTS

The respondents repeat and re-allege each and every allegation of this pleading as if set forth at length and assert that the welfare of the child mandates on their continued custody of the child and this court should so order.

Return to Writ

WHEREFORE the Writ should be discharged and the Petition dismissed and custody remanded to your respondents.

COLSON & HICKS, P. A.
and
PODHURST ORSECK & PARKS, P.A.

By _____
Attorney for Respondents

Appendix P - Portions of Petitioner's Brief

IN THE DISTRICT COURT OF APPEAL
OF FLORIDA THIRD DISTRICT

NO. 71-745

[Same Title]

* * *

ARGUMENT

DID THE TRIAL COURT ERR IN AWARDING THE INFANT CHILD TO STRANGERS RATHER THAN THE NATURAL MOTHER.

Judgments of foreign states relating to the custody of minor children are generally not accorded enforcement under the full faith and credit clause of the United States Constitution but such judgments are recognized and given great weight under the doctrine of comity. In the recent case of Powell v. Powell, Fla. App. 1971, 242 So.2d

138, the First District Court of Appeal in a habeas corpus proceeding brought to determine the custody of a minor child, had under consideration there a temporary order of a court of the State of Louisiana. The Louisiana Court had placed custody of the minor child in the husband. The First District Court of Appeal in commenting on the recognition that should be accorded the Louisiana judgment said:

> "Although the Louisiana judgment does not require enforcement in Florida under the full faith and credit clause, it is entitled to great weight and respect under the doctrine of comity absent a showing by clear and convincing evidence that such new conditions have arisen since rendition of the decree as would justify a change in custody."

The highest court of resort in the State of New York found that the Appellant was fit, competent and able to maintain, support and educate her child and further, that she was the natural mother of the infant child. In addition, it rescinded the consent which she had given to the child placing agency for the adoption of the child and directed the surrender of the child to her by those having its custody. Such findings and adjudication by the court of a sister state should not be disregarded, as it was here, but should be accorded recognition and enforcement under the principals of comity especially so where, as here, the New York adjudication was of such recent vintage. See Neal v. State, Fla. App. 1961, 135 So.2d 891 and Marrio v. Kridel, Fla. App. 1965, 179 So.2d 130, 133.

Portions of Petioner's Brief

The dilemma that had been created by the Florida trial court's denial of the Appellant's Petition for Habeas Corpus, is accentuated by the fact that the New York court adjudicated that the Appellant's consent for adoption given to the child placing agency who could in turn give a consent to specific persons such as the Appellees for the adoption of the infant child, was rescinded. That issue should now be res judicata, see McClay v. McClay, Fla. 1947, 2 So.2d 361, or at least the Appellees should be estopped by the New York Judgments. See Gordon v. Gordon, Fla. 1952, 59 So.2d 40 and Reynolds v. Reynolds, Fla. App. 1959, 117 So.2d 16, 21. Therefore, the Appellees are not in a position to adopt the infant child unless they go into an adversary proceeding against the natural mother.

The New York court further, in its judgment as previously stated, found the Appellant to be fit and competent and that adjudication is of recent vintage. It is only when there is a change in circumstances relating to the fitness of the person awarded custody by the foreign court that the judgment may be departed from in Florida.

* * *

No one in these proceedings has attacked the finality of that portion of the New York Judgment that rescinded the Appellant's consent to adoption given to the child placing agency and the fact that the Appellant is the natural mother of the child and a fit and proper person to have her child's

custody. The only area inquired into by the Florida trial court was whether or not it would be to the best interest of the minor child to have her returned to her natural mother or for her to remain in the possession of the Appellees. The trial judge found that it would be for the best interest of the child to remain with the Appellees, and on the contrary implicitly found it would cause the child to suffer some trauma if she was taken away from Appellees at this time.

* * *

Appendix Q - Portions of Petition for Rehearing or Suggestion for Certification

IN THE DISTRICT COURT OF APPEAL OF FLORIDA, THIRD DISTRICT.

No. 71-745

[Same Title]

COMES NOW the appellant, OLGA SCARPETTA, by her counsel, and pursuant to Rule 3.14, Florida Appellate Rules, and within the time provided therein, files this her petition for rehearing, directing this Court's attention to its opinion and decision filed September 28, 1971, and as grounds for such petition, says:

1. The Court may have overlooked and failed to consider the fact that, although the law of Florida as it relates to child custody matters,

does not accord decrees relating to custody full faith and credit, nevertheless, full faith and credit under the Federal Constitution should have been accorded the provisions of the New York judgment which found that the appellant had validly rescinded her consent to custody and adoption given to the Spence-Chapin child placing agency. Further this Court may have overlooked and failed to consider the fact that the New York judgment was also conclusive and entitled to full faith and credit on the finding made by the New York Court that the appellant was a fit and proper person to have the custody of her minor child.

2. That this Court may have overlooked and failed to consider the application of the decision and rationale in the case of POWELL v. POWELL, Fla. App. 1971, 242 So.2d 138, in the First District Court of Appeals. The POWELL case involved a habeas corpus proceeding brought to determine the custody of a minor child under a temporary order issued out of the State of Louisiana. The First District Court of Appeals said:

> "Although the Louisiana judgment does not require enforcement in Florida under the full faith and credit clause, it is entitled to great weight and respect under the doctrine of comity absent a showing by clear and convincing evidence that such new conditions have arisen since the rendition of the decree as would justify a change in custody."

Portions of Petition

There was no clear and convincing evidence that new conditions had arisen since the New York judgment as would justify the continued denial of the appellant to her child. The only condition that changed was that the appellees by their continued flouting of the New York judgment were permitted to cement their relationship with the appellant's minor child and to create a barrier which the trial court and this Court has now cemented by their judgments and decrees.

3. That this Court may have overlooked and failed to consider the clear holding of the First District Court of Appeal in the case of IN RE: VERMEULEN'S PETITION, Fla. App. 1959, 114 So.2d 192.

* * *

Since the appellant as the natural mother had a right under New York law to rescind her consent to custody as well as to adoption, and she properly and legally rescinded, she was entitled to the return of her child and the New York Court so held. The judgment of the trial court and this Court's opinion confirming the same is an open invitation to persons so inclined as were the appellees to whisk minor children from one jurisdiction to another without lawful authority and by the mere passage of time gaining the legal custody of the minor child through their illegal actions.

* * *

Portions of Petition

Respectfully submitted,

HORTON, SCHWARTZ & PERSE
and
ROSENBLATT & ROEMER
and
Zalk, Rubel & Perret
410 Concord Building
Miami, Florida 33130
Attorneys for Appellant

By:_____
Mallory H. Horton

I DO HEREBY CERTIFY that a true copy of the foregoing Petition for Rehearing was mailed to COLSON & HICKS, 66 West Flagler Street, Miami, Florida 33130, this 12th day of October, 1971.

_____
Mallory H. Horton

Appendix R - Portions of Petition for Writ of Certiorari to the District Court of Appeal, Third District

IN THE SUPREME COURT OF THE STATE OF FLORIDA

[Same Title]

To the Supreme Court of the State of Florida:

Portions of Petition

Petitioner, OLGA SCARPETTA, presents this her Petition for Writ of Certiorari and states:

* * *

6. On the foregoing facts the District Court of Appeal was presented with the following Point of Law:

> "Did the trial court err in awarding the infant child to strangers rather than the natural mother."

On the foregoing Point of Law the District Court of Appeal, Third District, rendered the following decision or holding:

> "We have carefully reviewed the record and briefs prepared by able counsel. The parties agree that a child custody order of a sister state is not entitled to full faith and credit, but may be given great weight under the doctrine of comity. See New York ex rel. Halvey v. Halvey, 330 U.S. 610, 67 S. Ct. 903, 91 L. Ed. 1133 (1947); Powell v. Powell, Fla. App. 1971, 242 So.2d 138; Mirras v. Mirras, Fla. App. 1967, 202 So.2d 887; Fox v. Fox, Fla. App. 1965, 179 So.2d 103; State ex rel. Fox v. Webster, Fla. App. 1963, 151 So.2d 14; Avery v. Heermance, Fla. App. 1962, 138 So.2d 775; Foster v. Sharpe, Fla. App. 1959, 114 So.2d 373; Bachman v. Mejias, 1 N.Y.2d 575, 154 N.Y.S.2d 903, 136 N.E.2d 866; Annot., 35 A.L.R.3d 520, 561; and Ehrenzweig, Inter-

state Recognition of Custody Decrees, 51 Mich. L. Review, 345, 352 (1953).

"We have and do give great weight and respect to the orders of sister states but we conclude, under the circumstances of this case, that the trial judge followed proper procedure and law in ruling that the best interests and welfare of Lenore were served by leaving her custody with the appellees. There is sufficient, competent and substantial evidence in the record on appeal to affirm his ruling. See Arnd't v. Prose, Fla. 1957, 94 So.2d 818; Fielding v. Highsmith, 152 Fla. 837, 13 So.2d 208 (1943); State ex rel. Weaver v. Hamans, 118 Fla. 230, 159 So. 31 (1935); Hancock v. Dupree, 100 Fla. 617, 129 So. 822 (1930); Witt v. Burford, 84 Fla. 201, 93 So. 186 (1922); McKinney v. Weeks, Fla. App. 1961, 130 So.2d 310; and 15 Fla. Jur. Habeas Corpus §62."

* * *

Appendix S - Portions of Petition for Rehearing

IN THE SUPREME COURT OF FLORIDA

No. 41,916

[Same Title]

COMES NOW the Petitioner, OLGA SCARPETTA, by her counsel and pursuant to Rule 3.14, Florida Appellate Rules, and within the time

provided therein, files this her Petition for Rehearing directed to this Court's Order of April 25, 1972 denying her Petition for Certiorari and as grounds for such Petition says:

1. The Court may have overlooked and failed to consider the fact that although morally the petitioner should never have temporarily relinquished her child to a child placing agency, nevertheless the Courts of the State of New York in an adversary proceeding there decided as a matter of law and fact that the petitioner had just cause and could validly and did validly rescind her consent. The New York Judgment in this regard we respectfully suggest is entitled to full faith and credit under the Federal Constitution. Likewise is the Judgment of the New York Courts conclusive and entitled to full faith and credit in finding that the petitioner was a fit and proper person to have custody of the minor child. At least such finding was entitled to full faith and credit as of the time of the entry of the New York Judgment. In addition, this Court may have overlooked and failed to give to the New York Judgment the degree of comity which should have been accorded it as to the fitness of the petitioner where during the time that had elapsed between the finding in the New York Court and the instigation of habeas corpus proceedings in Florida there was no change in the petitioner's fitness.

Appendix T - The Florida Habeas Corpus Statute

Florida Statutes Annotated, Section 79.01 HABEAS CORPUS, Application and Writ:

Whenever any person detained in custody, whether charged with a criminal offense or not, shall, by himself or by some other person in his behalf, apply to the supreme court of the state or to any justice thereof, or to any circuit judge, in vacation or in term time, for a writ of habeas corpus, and shall show by affidavit or evidence probable cause to believe that he is detained in custody without lawful authority, the court, the justice or judge to whom such application shall be made forthwith shall grant the writ, signed by himself, directed to the person in whose custody the applicant is detained, and returnable immediately before such court, justice or judge, or any of said courts, justices or judges, as the writ issued may direct.

Appendix U - Florida Social Welfare Statute

Laws 1969, c. 69-268, §1, eff. July 3, 1969. Amended by Laws 1969, c. 69-106, §§19, 35; Laws 1970, c. 70-255, §1, eff. June 30, 1970.

409.145 Care of children

(1) The following children shall be subject to the protection, care, and guidance of the division or any duly licensed public or private agency:

(a) Children with improper guardianship, including abandoned, neglected, and abused children.

Florida Social Welfare Statute

(b) Destitute or dependent children.

(c) Mentally retarded or physically handicapped children.

(d) Emotionally disturbed children.

(2) The juvenile courts of the various counties of this state shall cooperate with the division and its employees in carrying out the purposes and intent of this chapter. However, no child shall be taken away from its parents or guardians except after a judicial hearing or proceeding before a court of competent jurisdiction and after notice to such child's parents or guardians of such judicial hearing or proceeding or except by the written consent of said child's parents or guardians.

(3) The division is authorized to provide adoption services and to accept permanent commitment of children by order of a court of competent jurisdiction for the purpose of adoption placement of said children.

(4) Any funds appropriated by counties for child welfare services may be matched by state and federal funds, such funds to be utilized by the department for the benefit of children in said counties.

Appendix V - Social Services Law of the State of New York

Social Services Law of the State of New York (McKinney's Consolidated Laws of New York, Book 52-A).

§ 383. CARE AND CUSTODY OF CHILDREN

1. The parent of a child remanded or committed to an authorized agency shall not be entitled to the custody thereof, except upon consent of the court, public board, commission, or official responsible for the commitment of such child, or in pursuance of an order of a court or judicial officer of competent jurisdiction, determining that the interest of such child will be promoted thereby and that such parent is fit, competent and able to duly maintain, support and educate such child. The name of such child shall not be changed while in the custody of an authorized agency.

2. The custody of a child placed out or boarded out and not legally adopted or for whom legal guardianship has not been granted shall be vested during his minority, or until discharged by such authorized agency from its care and supervision, in the authorized agency placing out or boarding out such child and any such authorized agency may in its discretion remove such child from the home where placed or boarded. L.1940, c. 619, §3, eff. March 1, 1941.

Appendix W – Portions of Domestic Relations Law-State of New York

Portions of Domestic Relations Law -- State of New York (McKinney's Consolidated Laws of New York (Book 14)).

§ 112. GENERAL PROVISIONS RELATING TO ADOPTION FROM AUTHORIZED AGENCIES.

In an adoption from an authorized agency the following requirements shall be observed:

* * * * * *

3. The authorized agency must present to such judge or surrogate a schedule to be annexed to the petition which shall be verified by a duly constituted official of the authorized agency having custody of the adoptive child or actually placing the child for adoption and shall contain (1) the full name of the child, (2) the manner in which the authorized agency obtained custody of the adoptive child, and (3) the facts, if any, which render unnecessary the consent of either or both of the parents of the adoptive child.

4. None of the papers in the proceeding shall state the surname of the child in the title and no petition,

Portions of Domestic Relations Law -- State of New York (McKinney's Consolidated Laws of New York (Book 14)).

agreement, consent, affidavit, nor any other document which is required to be signed by the adoptive parents shall contain the surname of the adoptive child.

6. Where the adoptive child is less than eighteen years of age, no order of adoption shall be made until such child has resided with the adoptive parents for at least six months unless the judge or surrogate in his discretion shall dispense with such period of residence and shall recite in the order the reason for such action.

* * * * * * *

INDEX

		Page
I	OPINIONS BELOW	2
II	QUESTIONS PRESENTED	2
III	CONSTITUTIONAL PROVISIONS INVOLVED	3
IV	STATEMENT OF THE CASE	4
V	REASONS FOR DENYING WRIT	21
VI	CONCLUSION	49
VII	CERTIFICATE OF SERVICE	50

TABLE OF CASES AND AUTHORITIES CITED

Case	Page
Ardn't v. Prose, 94 So.2d 818 (1957)	6, 35, 41
Avery v. Heermance, 138 So.2d 775 (1962)	6, 23, 24
Bachman v. Mejias, 1 N.Y.2d 575, 154 N.Y.S.2d 903, 136 N. E. 2d 866 (1956)	6, 24
Crane v. Hayes, 253 So.2d 435 (1971)	7, 24, 42
Day v. Nelson, 213 So.2d 491 (1968)	42
Erhardt v. Erhardt, 27 A.D.2d 734, 277 N.Y.S.2d 734 (1967)	25
Fielding v. Highsmith, 152 Fla. 837, 13 So.2d 208 (1943)	6, 38, 39, 41
Foster v. Sharpe, 114 So.2d 373 (1959)	6, 23
Fox v. Fox, 179 So.2d 103 (1965)	6, 22
Gilman v. Morgan, 158 Fla. 605, 29 So.2d 372	26, 29

TABLE OF CASES AND AUTHORITIES CITED (cont.)

Case	Page
Hancock v. Dupree, 100 Fla. 617, 129 So. 822 (1930)	6, 42
McKinney v. Weeks, 130 So.2d 310 (1961)	7, 40
May v. Anderson, 345 U.S. 528, 73 S.Ct. 840 (1953)	22, 25, 26, 29, 32
Mirras v. Mirras, 202 So.2d 887 (1967)	6, 22, 23, 25, 26, 29
Neal v. State, 135 So.2d 891 (1961)	29
New York ex rel. Halvey v. Halvey, 330 U.S. 610, 67 S.Ct. 903, 91 L.Ed. 1133 (1947)	6, 22, 23, 29, 32
Painter v. Bannister, 258 Iowa 1390, 149 N.W.2d 152, cert.den. 385 U.S. 949	27, 33, 44
People v. Jane D. Edwards & Spence Chapin, 23 N.Y.2d 925, 298 N.E.2d 508	21, 27
People ex rel. Stone v. Maglio, S.Ct. 1970, 308 N.Y.S.2d 604	27

TABLE OF CASES AND AUTHORITIES CITED (cont.)

Case	Page
Powell v. Powell, 242 So.2d 138 (1970)	6
Rice v. Sioux City Memorial Park Cemetery, 349 U.S. 70 (1955)	47
Robertson v. Bass, 52 Fla. 420, 42 So. 243	7, 24, 42
Skeen v. Marx, 105 So.2d 517 (1958)	27
State ex rel. Fox v. Webster, 151 So.2d 14 (1963)	6, 22, 26, 28, 29
State ex rel. Hicks v. Cain, 160 Fla. 680, 36 So.2d 275 (1948)	42
State ex rel. Weaver v. Hamans, 118 Fla. 230, 159 So. 31 (1935)	6, 42, 44
United States v. Johnston, 268 U.S. 220, 45 S.Ct. 496 (1925)	47
Vermeulen's Petition, In re, 114 So.2d 192 (1959)	45
Weiner v. Weiner, S. Ct. N.Y. Co. 1956, 149 N.Y.S.2d 362	25

TABLE OF CASES AND AUTHORITIES CITED (cont.)

Case	Page
Williams v. North Carolina, 325 U.S. 226	22, 25
Witt v. Burford, 84 Fla. 201, 93 So. 186 (1922)	6, 7, 42
Annot., 35 A.L.R.3d 520, 561	6
Ehrenzweig, *Interstate Recognition of Custody Decrees*, 51 Mich. L. Rev., 345, 352	6, 24
15 Fla.Jur., *Habeas Corpus* §62	41
Foster, *Revocation of Consent to Adoption: A Covenant Running With the Child?*, N.Y. Law Journal, Vol. 166, §26 (Aug. 6, 1971)	21
28 U.S.C. §1738	23
Stumberg, *The Status of Children in the Conflict of Laws*, U.Chic.L.Rev. 42 (1940)	23
Restatement (Second) of Conflict of Laws §79	24
R. Leflar, *American Conflicts Law* (1968)	24
Robertson & Kirkham, *Jurisdiction of the Supreme Court of the United States* (1951 Ed)	31, 32
Constitution of the United States Article IV, Section 1	3

In the Supreme Court of the United States

OCTOBER TERM 1972

No. 72-349

OLGA SCARPETTA,

Petitioner,

vs.

NICK F. DEMARTINO and JEAN DEMARTINO,

Respondents.

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF FLORIDA

The respondents here were the successful respondents in the Florida courts, at all stages, in a child custody habeas corpus proceeding.

The petitioner was the unsuccessful petitioner in the Florida courts.

This brief is filed by the respondents in opposition to a petition for a writ of certiorari to the Florida Supreme Court, heretofore filed in this court.

I

OPINIONS BELOW

The decision of the Supreme Court of Florida without opinion, is reported at 262 So.2d 442 (Appendix A to Petition). The opinion of the District Court of Appeal of Florida, Third District (Appendix B to Petition) is reported at 254 So.2d 813. The decision and judgment of the Circuit Court of the 11th Judicial Circuit in and for Dade County, Florida, is unreported (Appendix C, Appendix C-1 to Petition).

II

QUESTIONS PRESENTED

The respondents here *restate* the real issues involved as follows:

1. ARE THE FLORIDA COURTS REQUIRED TO AFFORD FULL FAITH AND CREDIT TO A CUSTODY DECREE OF A NEW YORK COURT, ESPECIALLY WHERE, AS HERE, CIRCUMSTANCES HAVE CHANGED SINCE THE NEW YORK DECREE WAS RENDERED; THE ISSUE OF THE INFANT'S BEST WELFARE WAS NOT MEANINGFULLY LITIGATED IN THE PRIOR LITIGATION; THE FOSTER-PARENTS, RESPONDENTS HERE, WERE NOT BEFORE THE NEW YORK COURT; AND THE PETITIONERS BELOW WAIVED ANY CONTENTION THAT FULL FAITH AND CREDIT APPLIED?

2. WERE ANY CONCEPTS OF DUE PROCESS VIOLATED BY THE FLORIDA PROCEDURE EMPLOYED HERE WHERE A FULL HEARING ON THE BEST INTERESTS AND WELFARE OF THE CHILD WAS HAD, AND ISSUES FULLY WERE LITIGATED WITH ALL INTERESTED PARTIES BEFORE THE COURT; AND WHERE NO SUCH CONSTITUTIONAL ARGUMENTS WERE RAISED BELOW AT ANY TIME?

3. WILL WRIT OF CERTIORARI BE GRANTED WHERE NO SPECIAL REASONS AS CONTEMPLATED BY RULE 19 EXIST; AND THE MATTER INVOLVES A DETERMINATION OF THE CHILD'S BEST WELFARE ON UNIQUE FACTS, ON AN EXTENSIVE RECORD, IN A UNIQUE "EPISODIC" CASE?

III

CONSTITUTIONAL PROVISIONS INVOLVED

The petitioner claims that the following constitutional provisions are involved:

Constitution of the United States, Article IV, Section 1.

"Full faith and Credit shall be given in each State to the public Acts, Records, and judicial proceedings of every other State. And the Con-

> gress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof."

Constitution of the United States, Amendment XIV, Section 1.

> ". . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

IV

STATEMENT OF THE CASE

The petitioner has stated the case in an inappropriate light. The determination in Florida was predicated upon a full evidentiary hearing—with all parties before the court. Accordingly the respondents restate the underlying facts here, in detail.

The Dade County Circuit Court determined that the best interests and welfare of the child, born out of wedlock, dictated that she remain in the custody of the respondents—with whom she had lived continuously since shortly after her birth. The judgment of the trial court was entered after an extensive hearing, and upon consideration of a mass of testimony, expert and otherwise, and documentary evidence (Appendix to petition, 5a-6a).

The Third District Court of Appeal of Florida affirmed, finding—with good reason—substantial competent evidence in support of the trial court's decision regarding the best welfare of the infant. The court applied well-established sound principles of law regarding full faith and credit, comity, changed conditions, and welfare of the infant. The affirmance involved simply a factual evaluation on a unique record, and application of established rules of law from which there was no semblance of departure (254 So.2 813; Appendix B).

In affirming the trial court, the Florida Third District held:

> Olga Scarpetta filed a petition for writ of habeas corpus against Nick F. and Jean DeMartino alleging they had illegal custody of her minor child, Lenore, and she prayed for custody of Lenore. Appropriate pleadings were filed and a hearing held. The parties appeared, testimony was taken, and the petition was thereafter denied. She has appealed.
>
> This appears to be one of those tragic situations in which one of two innocent parties must suffer. We do not attempt to assess fault or blame to either party.

C.T.—Conformed Transcript of portions of Record on Appeal in Third District furnished by Petitioner to Florida Supreme Court and lodged in Supreme Court under Florida procedure.

R.T.—Conformed Transcript of Respondent in Florida Supreme Court.

Note: All emphasis supplied.

We have carefully reviewed the record and briefs prepared by able counsel. *The parties agree that a child custody order of a sister state is not entitled to full faith and credit but may be given great weight under the doctrine of comity.* See New York ex rel. Halvey v. Halvey, 330 U.S. 610, 67 S.Ct. 903, 91 L.Ed. 1133 (1947); Powell v. Powell, Fla.App. 1971, 242 So.2d 138; Mirras v. Mirras, Fla.App. 1967, 202 So.2d 887; Fox v. Fox, Fla.App. 1965, 179 So.2d 103; State ex rel Fox v. Webster, Fla.App. 1963, 151 So.2d 14; Avery v. Heermance, Fla.App. 1962, 138 So.2d 775; Foster v. Sharpe, Fla.App. 1959, 114 So.2d 373; Bachman v. Mejias, 1 N.Y. 2d 575, 154 N.Y.S. 2d 903, 136 N.E. 2d 866 (1956); Annot., 35 A.L.R. 3d 520, 561; and Ehrenzweig, Interstate Recognition of Custody Decrees, 51 Mich. L. Review, 345, 352 (1953).

We have and do give great weight and respect to the orders of sister states but we conclude, under the circumstances of this case, that the trial judge followed proper procedure and law in ruling that the best interests and welfare of Lenore were served by leaving her custody with the appellees. There is sufficient, competent and substantial evidence in the record on appeal to affirm his ruling. See Arnd't v. Prose, Fla. 1957, 94 So.2d 818; Fielding v. Highsmith, 152 Fla. 837, 13 So.2d 208 (1943); State ex-rel. Weaver v. Hamans, 118 Fla. 230, 159 So. 31 (1935); Hancock v. Dupree, 100 Fla. 617, 129 So. 822 (1930); Witt v. Burford,

84 Fla. 201, 93 So. 186 (1922); McKinney v. Weeks, Fla.App. 1961, 130 So.2d 810; and 15 Fla.Jur. Habeas Corpus §62.

The order appealed herein is therefore, Affirmed. (R. T. 1-2)

In denying rehearing with supplemental opinion, the court said further:

> Appellant has filed a vigorous and well reasoned petition for rehearing.
>
> We point out that the *change in circumstances* and passage of time giving rise to the relationship between the baby, Lenore, and the DeMartinos occurred in great part because of appellant's consent, through her New York attorneys, that the custody of Lenore remain with the DeMartinos during the pendency of certain New York legal proceedings.
>
> The petition for rehearing, having been considered, is denied. See Robertson v. Bass, Fla. 1906, 52 Fla. 420, 42 So. 243; and Crane v. Hayes, Fla. 1971, 253 So.2d 435, opinion #40,832, filed September 29, 1971.

The Florida Supreme Court simply denied certiorari. (262 So.2d 442)

There was a full hearing in the trial court on the child's best interest and welfare here. The Florida Courts ruled as they did based upon the unique *evidence adduced.*

The decisions in the trial court and Third District clearly reflect that the trial court found on the *evidence adduced* that circumstances and conditions with regard to the child's welfare had changed materially and substantially since the New York State trial proceedings to which the respondents here were not parties anyway; and that therefore, although "*great weight*" was given to the New York custody order still

> *under the circumstances of this case . . . the trial judge followed proper procedure and law in ruling that the best interests and welfare of Lenore were served by leaving her custody with the appellees (respondents). There is sufficient competent evidence in the record on appeal to affirm his ruling.* [citing cases].

The supplemental opinion clearly points out that there was "a change in circumstances and passage of time," since the New York proceedings which was not attributable to the respondents.

Thus it is clear that the decisions below were based on a factual evaluation of the trial proceedings and evidence.

THE TRIAL PROCEEDINGS

1. *Evidence Presented* — The record reveals the following: The habeas corpus proceeding was instituted by Olga Scarpetta, the natural mother of the illegitimate infant, Baby Lenore (A. 47(a)). The petitioner-mother gave birth to the child out of wedlock in New York on

May 18, 1970. A few days thereafter, she surrendered the infant to a fine, well-established New York adoption agency, Spence-Chapin.

On June 1, 1970, after repeated counseling sessions during pregnancy, and after full opportunity to change her mind subsequent to the birth of the child, Miss Scarpetta signed and executed a sworn surrender of the child with the view toward ultimate adoption by suitable parents. There had been fourteen visits with the Spence-Chapin social worker during pregnancy at which time adoption and its ramifications were discussed. Miss Scarpetta had numerous alternatives available to her but chose not to turn her baby over to the father or her family, or even to tell her family at that time. There had been a visit by Miss Scarpetta to the agency on May 29, 1970, at which time she had intended to sign the surrender but did not do so; and was advised to think it over, and finally the June 1, 1970 visit, when she voluntarily and openly executed the surrender.

Thereafter, on June 18, 1970, pursuant to the surrender document, custody was given to the foster parents, Nick and Jean DeMartino, for eventual adoption. The adoptive father is a New York attorney, and a religious, highly intelligent and responsible citizen; and an outstanding husband and father. In the same vein, the mother, Jean, is an intelligent, highly competent, sensitive, calm, fulltime housewife and mother. (R.T. 2-9; 10; 11-25).

By contrast, with no personal reflection upon Olga Scarpetta, the petitioner, her circumstances are quite different. She lives in an apartment in New York City and works full time for a living. She is not an American

citizen and her family resides permanently in South America. The father of the child is a South American citizen from Bogota and is married and the parent of children of his marriage (C.T. 102-106; 108-109; 111-112).

Miss Scarpetta is not presently engaged, nor does she have any immediate plans to marry (R.T. 21).

If custody were awarded to her, Miss Scarpetta would leave the child each work day, all day long, in the hands of a 65 year old, non-English speaking friend from South America, who would serve as a full time baby-sitter in the New York apartment (R.T. 22-23).

The child would not have the desirable guidance and moral support and comfort of a father, nor a normal family life and home. She would be brought up in a New York City apartment (R.T. 24-25; 26-27).

The DeMartinos have another adopted child, Linda, now age 4. Lenore, now well over 2 years old, and over a year old at the time of the trial herein, knows only the respondents as her parents, and Linda as her sister and these are the only parents and family she has ever known. She has formed close, healthy, warm familial and emotional ties with the respondents, obviously, and with her "sister" and with the DeMartino relatives (R.T. 28-34).

The proof at the trial overwhelmingly and convincingly demonstrated that a forced separation of Baby Lenore from her family at this juncture would be devastating to her from a psychiatric, psychological and medical point of view. The testimony was presented by numerous eminently qualified experts and, indeed, two world recognized authorities (R.T. 35-36; 11).

In all events, toward the end of June, Miss Scarpetta changed her mind about the adoption. She claimed that she called the agency on June 18, 1970, to inform them of her decision although the social worker at the agency said that the agency first received a call from a hospital social worker on June 23, 1970, on behalf of Miss Scarpetta, indicating a change of mind. Certainly the hospital worker was contacted on June 23, 1970 and an appointment was set up with the agency for June 29, 1970 or June 30, 1970, at which time Miss Scarpetta formally said she had changed her mind about the adoption and asked for the return of Lenore—now living with the DeMartinos. She was told that the baby had been placed for adoption, and advised to go for further counseling.

The petitioner ultimately went to a lawyer and on August 3, 1970 executed a letter seeking the return of the child. The baby, of course, was living with the DeMartinos, and her ties were increasing by leaps and bounds.

2. *Proof of Proceedings in New York Courts*—On September 21, 1970, Miss Scarpetta brought a habeas corpus proceeding in New York. The agency, and only the agency, was named as a respondent (C.T. 88). She sought the return of the child. A trial was had on November 2, 1970 (C.T. 101). At the trial in New York the only witnesses who testified were the petitioner, the agency social worker, and two agency representatives who testified on Spence-Chapin policy (C.T. 101-132). Not an iota of testimony was presented as to the effects the transfer might have on Lenore, then 5½ months of age. There simply was *no* meaningful adversary proceeding. The only inquiry was into circumstances surrounding the surrender, and the attempt and efforts to revoke, and the then-condition of Miss Scarpetta. And, of course, the DeMartinos

were not made parties, or served under the vagaries of the New York adoption law, nor called as witnesses, nor given any opportunity to be heard or to cross-examine or confront anyone.

Miss Scarpetta prevailed—as between her and the agency. She was allowed to revoke the surrender and the writ was sustained by judgment dated November 20, 1970 (C.T. 5-7). At this time, Baby Lenore was just 6 months of age, living with the DeMartinos. Her attachment to them continued to grow. Spence-Chapin appealed to the Appellate Division, First Department, and the decision was affirmed on January 28, 1971. Pending the appeal, a stay which had been incorporated into the judgment of the trial court was in full force and effect. The stay was entered upon the stipulation of *Miss Scarpetta* and the Spence-Chapin Agency (C.T. 146; 85-87). The DeMartinos were not parties to the appeal nor did they secure the stay (C.T. 3). At the time of the Appellate Division affirmance (C.T. 69-70), Baby Lenore, needless to say, was with her family, the DeMartinos, and now was over 8 months old. Her emotional and psychiatric and psychological attachments continued to grow.

Thereafter, the Spence-Chapin agency appealed, upon permission granted, to the New York Court of Appeals. The order granting permission contained a show cause order and stay (C.T. 73-74). The DeMartinos were not parties to the appeal and did not secure the stay. The argument was held on March 1, 1971, and the matter was affirmed on April 1, 1971. The remittitur of the New York Court of Appeals issued on April 7, 1971. Now "Baby Lenore" was over 10½ months old, living lawfully still with the DeMartinos (C.T. 41-55; 59).

So until April 7, 1971, and indeed subsequent thereto, a stay was in full force and effect; the agency-respondent (and, of course, the DeMartinos) *was not* required to give up the child and lawful custody of Baby Lenore remained with the DeMartinos.

On April 28, 1971, the New York trial court signed an exparte order, directing the *DeMartinos* to turn the baby over to the petitioner, upon remand of the cause. The return date was May 3, 1971 (C.T. 16). The Court of Appeals remittitur had not even contained the names of the DeMartinos.

In the meantime, the DeMartinos filed an action in the United States District Court, Southern District of New York, for declaratory decree and injunction against enforcement of the New York state orders. They claimed their civil rights and constitutional rights were denied because they were not permitted to intervene or to be heard in state court and due process was violated. A stay of New York court proceedings was in effect on May 3, 1971, in this action (R.T. 37). The complaint was dismissed and injunction denied *because* the Federal Court ruled that the remedy of the DeMartinos—who claimed violation of due process—was by way of appeal to the United States Supreme Court from the decision of the New York Court of Appeals. (R.T. 38).[1]

As a matter of fact, the DeMartinos sought to intervene in the state trial court in late November and sought to intervene in the Appellate Division and the

[1]A stay pending appeal was denied in the Second Cicuit Court of Appeals, but a stay was granted to and including May 5, 1971, to afford the opportunity to obtain a stay in the United States Supreme Court.

Court of Appeals. All applications were denied (R.T. 39-40; 41-42). The Court of Appeals directly ruled in its opinion that the DeMartinos had no right to intervene under the vagaries of the New York adoption law.

In the meantime, prior to service upon them of *any* papers whatsoever and upon repeated refusals to permit them to intervene, the DeMartinos moved to Florida and established their residence here with their children. Jean and the children came here early in April and Nick came in early May.

On May 27, 1971, the New York trial court entered an order purportedly holding the DeMartinos in contempt but they were long since in Florida and never were served with any process—obviously. There was *no* hearing on the contempt order and no service ever of the May 3 turnover order or any other order on the DeMartinos—who were never even afforded the opportunity to be heard in New York.

As a matter of fact, Jean DeMartino never even knew that Olga Scarpetta had instituted habeas corpus proceedings in New York against the agency until two or three days before Thanksgiving of 1970, after the New York trial court already had ruled (R.T. 43-44). The DeMartinos were not even called as witnesses and, until the Florida hearing of June 22, 1971, they had not been permitted to appear in *any* court to present testimony on the best interest of "Baby Lenore". Mr. DeMartino was advised of the Scarpetta New York petition on or about the hearing date but was advised not to tell Jean.

As of early May 1971, when stays in the New York litigation still existed, "Baby Lenore" was just under one year old. She was living happily and lawfully with her family—her parents, or rather the only parents she had ever known, and her sister.

After the DeMartinos publicly announced their presence and residence in Florida, Olga Scarpetta filed a petition for a writ of habeas corpus in the Circuit Court, Dade County, on June 10, 1971, alleging illegal detention of Lenore (C.T. 4-5). The DeMartinos filed their written return telling in detail their version of events and asking for continued custody in the best interest of Lenore; and asserting that a turn-over of the child would be harmful to the baby medically (C.T. 6-11).

A hearing was had on June 11, 1971, and Judge Cullen, after a full and thorough legal argument, ruled that testimony on the best interests and welfare of Baby Lenore would be appropriate.

Trial was set and conducted on June 22, 1971 (R.T. 45). The best interest and welfare of Baby Lenore were fully explored. Only then, upon a full exploration of the welfare of *Lenore*—not that of the contending parties—was the decision below reached—and adhered to after a full argument on petition for rehearing, and the decision was confirmed on an exhaustive journey through the Florida Appellate process.

Because the medical, psychiatric and psychological testimony is so clear, overwhelming and compelling, and not discussed at *all* in the petition, the salient features of that testimony are outlined here.

3. *Expert Testimony*

a). *Dr. Hirst W. Libo*

Dr. Libo, eminently qualified, was the New York pediatrician for the DeMartino children. Lenore was somewhat withdrawn on June 19, 1970, but then her development commenced. The DeMartinos were excellent parents, clam, logical and reasonable. There was a natural empathy between Lenore and Jean DeMartino.

At trial, Lenore was thirteen months old. The circumstances of Lenore's custody were recited, and Dr. Libo unequivocally testified that at this "particular critical time in her development" it would be one of the "worst things" which could occur if Lenore were taken from the DeMartinos and given back to the biological mother (R.T. 47).

According to the doctor, pediatric opinion was in agreement: the child should remain with the people who have cared for it through this "very critical and formative period of her life" and that 13 months is a critical period in child adjustment and personality development. The child can be "severely damaged if the child is removed from the mother figure" (R.T. 47-48).

Simply stated, the doctor said: "At this particular point in this child's emotional development it would be wrong to take this child away from its mother." (R.T. 49).

If the child were returned to Miss Scarpetta at age 5½ months, it would have been at the edge of time when

permanent scars would result; it would have been bad but the risk would be less than for such a transfer at critical age of thirteen months.

The damage to a thirteen-month-old and to a child taken away thereafter, at ages three or four, would be similar to losing parents and "having your guts ripped out and you don't have any sense you can survive without them" (R.T. 57). This is a "time-anchored" slot in psychological development process (R.T. 57).

c) *Dr. Richard Toister*

Dr. Toister is a well-qualified child-psychologist and pediatrician. He teaches at University of Miami Medical School, and has offices at Mailman Center for Child Development. He performed psychometric tests on Lenore and the DeMartinos. Lenore was normal in all respects and developing normally. The DeMartinos were bright, verbal, intelligent and well-integrated in personality without disorder. They were bright parents.

In Dr. Toister's opinion, a transfer of custody would be "detrimental" to the child at this "critical" period of adjustment (R.T. 58-59) The period of 6 months of age to 2 or 2½ years of age is particularly critical for stable attachments (R.T. 59). "Any separation from the mother figure, the motor parent, would be detrimental to the child's future development." (R.T. 59)

A transfer at five months still could have caused permanent damage; the critical period begins at a range of perhaps 3 months to 6 or 7 months.

The recognized significant period is 6 months to two or two and one-half years. To a reasonable medical certainty, the transfer now would cause stress which could lead to permanent problems. There is a probability of detrimental effects (R.T. 60).

d) *Dr. Ben Sheppard*

Dr. Sheppard is a well known Miami pediatrician and psychiatrist, who has spent a lifetime dealing with children's problems. He said: "It's my very considered opinion that the best interest of this child would be served by permitting her to remain with the present adoptive parents." (R.T. 61-62).

The formative months are five or six to eighteen. A transfer "would be traumatic", "might lead to chronic illness, and certainly might leave scars . . ." (R.T. 62, 63). The opinion was based on reasonable medical probability (R.T. 63).

The doctor said that he "would even go a little stronger" in stating that there might be permanent damage; and that in view of the odds—"we can't play games with this child's future". The danger of transfer at five months would still be present but probably not as much as at six months (R.T. 64-65).

e) *Dr. Carolyn Rabinowitz*

This child psychologist teaches at the University of Miami and also is connected with the Mailman Child Development Center. She said, with reference to the welfare of Baby Lenore:

"The basic thing for Baby Lenore at this age is not to be separated from the DeMartinos, the only parents she has known." (R.T. 66-67).

• • •

"For the child to be separated from the mother at this time is the equivalent of death to the child. The loss of the mother is something the child cannot comprehend." (R.T. 67-68).

The child responds in various ways: he may become apathetic and gain or lose weight. He may become withdrawn and depressed, sleepless, irritable, and psychosomatic. He may regress in walking and talking. In any event, he has no way of coping with what is—as to it—a death situation.

Separation at this time, from the DeMartinos, involves a "severe risk" and "it's a risk" that the witness "for one, would never be willing to endorse or undertake". There would be a "high likelihood" of "severe consequences". And the effects would not be overcome in a matter of months.

This was a "specific medical opinion". Transfer of custody from the mother figure "would be very bad for the child". (R.T. 69-71)

f) *Dr. Stella Chess*

This lady is a renowed child psychiatrist, teacher, writer, scholar, and one of the world leaders in the field—nor more and no less. She actually examined the DeMartinos, at her own decision, prior to testifying (R.T. 35, 11).

Lenore was developing normally and related to strangers well—with Jean DeMartino as her base. She had obvious affectionate ties to her family and sister—whom she imitated (R.T. 13-20).

In the opinion of this authority, under the circumstances here:

> "I do not think it would be in the best interests of the child to move her." (R.T. 18)

Such a change may be made only under the most dire circumstances "because of the evidence of personality distortion" which results (R.T. 19).

Movement is "critical" at this age and a happily flourishing child should not be transferred. To a reasonable medical certainty, movement would result in the probability of harm to Lenore based on past experiences in similar cases (R.T. 72-73).

Movement at five months or five and one-half months would not be best but at thirteen months, transfer from the parent figure would be particularly bad.[2]

Olga Scarpetta appealed and, of course, did not prevail. Affirmance was based on the facts.[3] (Appendix B to petition). The Florida Supreme Court denied certiorari. The petition by the natural mother followed.

---

[2]Against authorities like these, the petitioner produced one-non-medical doctor, non-teacher, child psychologist who said transfer of custody at 13 months of age to Miss Scarpetta would result in no permanent problems. He recognized the authority—as must anyone—of Stella Chess (R.T. 35, 11).

[3]Constant reference is made to the so-called absolute right of the mother to revoke her consent and surrender under New York law, and the DeMartinos awareness of this possibility. As a matter of fact, New

V

REASONS FOR DENYING WRIT

I. FLORIDA COURTS NOT REQUIRED TO AFFORD FULL FAITH AND CREDIT TO CUSTODY DECREE OF NEW YORK COURT, ESPECIALLY WHERE, AS HERE, CIRCUMSTANCES HAVE CHANGED SINCE THE NEW YORK DECREE WAS RENDERED; THE ISSUE OF THE INFANT'S BEST WELFARE WAS NOT MEANINGFULLY LITIGATED IN THE PRIOR LITIGATION; THE FOSTER-PARENTS, RESPONDENTS HERE, WERE NOT BEFORE THE NEW YORK COURT; AND THE PETITIONER BELOW WAIVED ANY CONTENTION THAT FULL FAITH AND CREDIT APPLIED.

York's statutory scheme has not been heretofore interpreted judicially as permitting such a revocation in an agency adoption situation; See FOSTER, DEVOCATION OF CONSENT TO ADOPTION: A COVENANT RUNNING WITH THE CHILD? New York Law Journal, Vol. 166, #26 (Aug. 6, 1971). This is different from a private placement with no counseling. The six month period is to determine the mother's fitness. Prior cases in New York cited by Professor Foster show the distinction. To make matters even more confusing, in 1969 the Court of Appeals reached a conclusion basically opposite to the one here: PEOPLE v. JANE D. EDWARDS AND SPENCE CHAPIN, 23 N.Y.2d 925, 298 N.E.2d 508, on revocation. How then, can it seriously be urged that the respondents were chargeable with knowledge of a revocation? Even the New York courts had no such knowledge before this case. The DeMartinos were never told of the possibility of legal action when they first took the baby.

1. *Full Faith and Credit Not Required Here*

Nothing is more solidly established in the constitutional jurisprudence than that custody orders, entered in proceedings in other states, are not entitled to full faith and credit in subsequent proceedings brought in Florida. This is particularly true where, as here, circumstances have changed; one of the essential contending parties in Florida was not even before the court in the foreign jurisdiction; and the crucial issue of the child's best interests was not even litigated in the prior proceedings in any *meaningful* way. *New York* ex. rel. *Halvey v. Halvey*, 330 U.S. 610, 613-27 (1942); *May v. Anderson*, 345 U.S. 528; see also, *Williams v. North Carolina*, 325 U.S. 226, 229.

It is clearly established that custody orders and decrees of foreign jurisdictions are not final judgments entitled to full faith and credit in this state where the conditions are markedly different now in the Florida proceeding than they were when the orders were entered in the foreign jurisdiction. *New York ex. rel. Halvey v. Halvey*, supra.

The appellate courts of Florida, in accordance with the controlling decisions of this court, repeatedly have stated that decrees involving the custody of children, entered in other states are not automatically binding under constitutional edicts of full faith and credit. See Florida cases collected in Annotation, 35 *A.L.R.* 3*d* at p. 561. There can be no question but that this is the rule. State ex rel. *Fox v. Webster* (1963, Fla. App.) 151 So.2d 14, cert. den. 379 U.S. 822, 13 L.Ed2d 33, 35 S. Ct. 45; *Fox v. Fox* (1965, Fla.App.) 179 So.2d 103; *Mirras v.*

Mirras (1967, Fla. App.) 202 So.2d 887; *Avery v. Heermance* (1962, Fla.App.) 138 So.2d 775; *Foster v. Sharpe* (1959, Fla.App.) 114 So.2d 373.

Custody awards simply do not have the attributes of a final judgment entitled to full faith and credit under the Constitution of the United States, Article IV, §1; or 28 U.S.C. §1738. Where welfare of the child is a consideration, like it is in Florida, then an adjudication by another court at another time simply does not bind Florida courts. Custody is never final; see *Stumberg, The Status of Children in The Conflict of Laws*, *U.Chi.L. Rev. 42, 56-57 (1940).

And certainly where new facts arise subsequent to the hearing in the other state, full faith and credit cannot conceivably be a bar to a full determination on the merits in this state; see *New York ex rel. Halvey v. Halvey*, 330 U.S. 610, 613 (1947). Here, the medical testimony unequivocally shows that subsequent to the time that Miss Scarpetta obtained her order against the *adoption agency*, and while the DeMartinos still lawfully retained custody of the child under appellate procedures and New York state procedures, pursuant to the *stipulation* of Miss Scarpetta, and the agency, and a series of stays, while the DeMartinos were striving to obtain their right to be heard, a medical situation arose, and still exists, which would render a turnover of the child to Miss Scarpetta physically, emotionally and psycholigically harmful to Lenore.

On this issue, the Florida Appellate Court squarely held:

"We point out that the change in circumstances and passage of time giving rise to the relationship between the baby, Lenore, and the DeMartinos occurred in great part because of appellant's consent, through her New York attorneys, that the custody of Lenore remain with the DeMartinos during the pendency of certain New York legal proceedings.

"The petition for rehearing, having been considered, is denied. See *Robertson v. Bass*, Fla. 1906, 52 Fla. 420, 42 So. 243; and *Crane v. Hayes*, Fla. 1971, 253 So.2d 435."

(Appendix B to Petition)

Indeed, even the absence of changed conditions, the courts, including New York, simply do not feel themselves bound by full faith and credit to accept the provisions of a foreign custody decree; the welfare of the child at the time is the primary consideration. *Bachman v. Mejias*, 1 N.Y. 2d 575, 154 N.Y.S. 2d 903, 136 N.E. 2d 866; *Restatement (Second) of Conflict of Laws*, §79, comment c, page 234; *R. Leflar, American Conflicts Law* (1968) 588-590; Ehrenzweig, *Interstate Recognition of Custody Decrees*, 51 Mich. L.Rev. 345, 352.

The New York Court of Appeals has taken the unequivocal position that full faith and credit does not apply to custody decrees since the state's duty as "parens patriae," to determine the child's best interest, is primary; *Bachman v. Mejias*, 1 N.Y. 2d 575, 136 N.E. 2d 903, It would indeed be a strange commentary on the process of law if Florida were to afford full faith and credit to

New York orders of this kind where New York would not even reciprocate if the situation were reversed, and indeed, specifically and repeatedly has refused to afford to Florida decrees any recognition whatsoever; *Erhardt v. Erhardt*, 2d Dept. 1967, 27 A.D. 2d 734, 277 N.Y.S. 2d 734; *Weiner v. Weiner*, S.Ct., N.Y. Co. 1956, 149 N.Y.S. 2d 362.

The welfare of a child is primary and decrees concerned with the custody of a child are in the words of Mr. Justice Frankfurter, subject to examination anew at any time. That Justice has stated that the exception to full faith and credit exists in the case of custody decrees because "the child's welfare in a custody case has such a claim upon the state that the responsibility is obviously not to be foreclosed by a prior adjudication reflecting another state's discharge of its responsibility at another time." *May v. Anderson*, 345 U.S. 528, 536 (concurring opinion).

On top of this, the DeMartinos were not permitted to intervene in the New York proceedings and thus their claim to custody is in no wise barred in Florida by any claim of full faith and credit; "full faith and credit" applies only where the litigating parties were *both* before the court in the prior litigation; and that court had personal and subject matter jurisdiction. This is the undisputed and undisputable law; *May v. Anderson*, 345 U.S. 528, 73 S.Ct. 840; the original court rendering judgment had no jurisdiction of the parties as well as the subject matter. See *Williams v. North Carolina*, 325 U.S. 226, 229; *Mirras v. Mirras*, Fla.App. 1967, 202 So.2d 887.

As we have seen the DeMartinos were not permitted to be heard in New York. Under the Florida rulings persons in the status of these respondents are entitled to a full hearing on the best interests of the child under Florida law and any court readily would award continuing custody to them on those interests. In short, for many, many reasons, the New York orders were meaningless at the time of the hearing in Florida, where the DeMartinos were for the first time, before the court.

More importantly the interests of Lenore never were properly, meaningfully and fully litigated in New York and those orders are predicated upon a fiction: that the best interest of the child necessarily rests with the natural mother. No meaningful testimony was taken in the New York proceedings regarding the surroundings of Lenore in the DeMartino home, nor was there any medical testimony concerning her best welfare and the effect on Lenore of her being separated from the only parents and family she had ever known, even at that time. Thus, full faith and credit simply does not apply; because there was a void of a meaningful, full adversary hearing with the participation of the DeMartinos, on the child's best welfare. Absent the DeMartinos, *May v. Anderson*, supra; and absent even a semblance of a fully adversary "welfare" hearing in New York, the doctrine of full faith and credit has no place here. *May v. Anderson* supra; *State ex rel. Fox v. Webster*, supra. *Mirras v. Mirras*, Fla.App. 1967, 202 So.2d 887 [squarely so holding]; *Gilman v. Morgan*, 158 Fla. 605, 29 So.2d 372 ["The question of the best interest of the child not having been litigated in a fully adversary manner in the foreign state, its decree would not be recognized or given effect by the Florida court."]

So strange indeed are the anamolies here, under the New York law, that the left hand of the New York Court of Appeals apparently does not know what the right hand is doing. In a case exactly like this one, in 1969, involving the same agency, the court held that the attempt to withdraw a consent would not be countenanced, *People ex rel. Doe v. Jane D. Edwards* and *Spence-Chapin*, 23 N.Y. 2d 925, 298 N.E. 2d 508 (child's best interests governs); accord: *People ex rel. Stone v. Maglio*, St.Ct. 1970, 308 N.Y.S. 2d 604. These cases actually reflect the Florida rule and policy — which rejects the withdrawal of consents in situations like this, *Skeen v. Marx*, *Fla.App.* 1958, 105 So.2d 517, and does not permit the child to be treated like a chattel at the whim, caprice and changing emotional needs of the natural mother.

The child's *present* interest is paramount, *Painter v. Bannister*, 258 Iowa 1390, 140 N.W. 2d 152, cert. den., 385 U.S. 949. The interest is unfettered by full faith and credit concepts.

2. *Doctrine of Unclean Hands Inapplicable*

The fact that the petitioner urges that the DeMartinos came to Florida in alleged contravention of New York orders did not and does not change the duty of Florida courts to determine the best interests of the child. The "clean hands" doctrine argument is misplaced. To begin with, the DeMartinos were not even parties in the New York litigation under the strange aspects of that law and yet the petitioner now contends that they are personally bound by it.

But in the second place Florida is committed to the following rule: When jurisdiction vests in a custody case like this one, the court has a duty to determine from the evidence where the minor child should be placed for its own best interest. The court should not refuse to exercise jurisdiction or be deterred in the discharge of its duty by what it might be convinced is the bad faith of a contending party in removing the child from a sister state in violation of court order. A foreign decree involving the issue of custody is required to give way to a Florida decree based on the best interests and welfare of the minor child. Custody decrees of sister states are not final within the meaning of full faith and credit. They may be modified from time to time according to the best interests and welfare of the child. It is the duty of the court to base its determination of where the custody of the child should reside on its own best interests and welfare and not on the good faith or bad faith of the parties; nor upon the violation of foreign court orders if any there be. These principles were pronounced by Dade County Circuit Court and were affirmed by the Third District Court of Appeal in *State ex rel. Fox v. Webster*, Fla.App. 1963, 151 So.2d 14; and this court denied a petition for a writ of certiorari addressed to that decision, 379 U.S. 822, 85 S.Ct. 45.

The United States Supreme Court has recognized clearly the doctrine — in turn clearly recognized in Florida — that full faith and credit in no event need be afforded to foreign orders of the type involved here. And the United States Supreme Court likewise has denied certiorari directed to a holding that this is true notwithstanding apparent violations of court orders by an actual contending party who removes the child from one state to another.

Here, of course, the DeMartinos were not even contending parties, and moved to Florida prior to service of any order on them, and their position is much stronger than that of the respondent in *Webster*, supra. They could not be in contempt of a court which they were not before, and which obtained no service or jurisdiction over them. Full faith and credit is not involved here.

3. *Comity Discretionary—No Abuse Shown*

The same considerations that obviously preclude application of full faith and credit here preclude even the dignity of comity being afforded to the New York orders. See *State of New York ex rel. Halvey v. Halvey*, supra; *May v. Anderson*, supra. Comity is a discretionary matter and where as here there was no full adversary hearing on the best interests of the child in New York, and the DeMartinos were not given the opportunity to be heard; *Mirras v. Mirras*, supra; *Gilman v. Morgan*, supra, 29 So.2d 372; *State ex rel. Fox v. Webster*, supra, 151 So.2d 14, 16-17; cf., *Neal v. State*, Fla.App. 1961, 135 So.2d 891, 894-895 (recognizing rule; parties must be before court); and where conditions since the New York hearing have changed markedly, since at this juncture the child would be devastated by a sudden, traumatic transfer to a perfect stranger, comity is no consideration; Florida repeatedly has said that the rights of a natural parent are not absolute. They have paid more than lip service to this rule. The child is a ward of the court and Florida is now parens patriae. Even a simple analysis of the evidence and testimony presented here shows convincingly, clearly and beyond dispute that not only does the welfare of the child dictate continued custody in the DeMartinos, but that the sudden, traumatic transfer, wresting Lenore

away from the only parents and the only family she has ever known would have far-reaching effects on her present and future well-being.

4. *Full Faith and Credit Issue Not Preserved Anyhow*

The petitioner conceded at the trial and on appeal that the issue involved here was *not* one of full faith and credit — but rather was one of discretionary comity. Having lost the battle of comity, the petitioner — who already waived the Constitutional issue, sought to resurrect it.

Indeed, the Third District Court of Appeal specifically noted in its opinion of affirmance, that:

> "The parties agree that a child custody order of a sister state is not entitled to full faith and credit but may be given great weight under the doctrine of comity. . . .
>
> We have and do give great weight and respect to the orders of sister states, but we conclude, under the circumstances of this case, that the trial judge followed proper procedure and law in ruling that the best interests and welfare of Lenore were served by leaving her custody with the appellees. There is sufficient, competent and substantial evidence in the record on appeal to affirm this ruling. . . . " (Appendix B)

Indeed, the petition itself, and the exhibits demonstrate that the issue of "full faith and credit," if it ever

were involved, was not preserved for review here (See Petition pp. 10-13).

The original habeas corpus petition in Dade County Circuit Court never *mentioned* "full faith and credit" (Appendix N.) The return and answer claimed that for a mass of reasons, "full faith and credit" was inapplicable (Appendix O).

At the trial and on appeal to the Third District Court of Appeal — as shown by the opinion there — the petitioner claimed simply that the ordinary rule of comity applied here and that "full faith and credit" need not be given to the New York custody decree (See Appendix B to Petition pp. 4a-5a; see also Appendix P).

Indeed, the petitioner points to its appellate brief in the Florida Appellate Court in an effort to show that it preserved the constitutional issue (See Petition, pg. 10; Appendix P., pg 58(a)). The brief clearly demonstrates that far from relying upon the "full faith and credit clause," the petitioner actually conceded its inapplicability to "this judgment of a sister state" relating to the custody of a minor child, and chose to rely upon the *discretionary* doctrine of comity (Appendix P., pp. 58(a)-60(a).

Thus, even assuming that the brief could be relied upon to show that the question timely was raised — which it can't, see, *Robertson & Kirkham, Jurisdiction of the Supreme Court of the United States* [1951 Ed.], § 79 and cases cited — the brief actually reflects the non-preservation and waiver of the issue.

In the brief, some reference was made to a state concept of res judicata (Appendix P; page 60a); and on petition for rehearing in the Third District (Appendix Q) the petitioner sought belatedly to rely on full faith and credit — too late with too little, and also sought to rely on comity.

Finally, the petition to the Florida Supreme Court, cited in the Appendix, once again does not squarely raise the issue. It simply recites the holding of the Appellate Court revealing that the "parties agree that a child custody order of a sister state is not entitled to full faith and credit, but may be given great weight under the doctrine of comity." (Appendix R., page 65(a)).

At various crucial times then, the petitioner not only waived the question of full faith and credit, but affirmatively restated its non-applicability. The petitioner never distinguished the New York custody decree from custody decrees involving disputes between natural parents, as she attempts to do in this petition, for the first time, to escape the effects of *May v. Anderson*, supra; and *State of New York, ex rel. Halvey v. Halvey*, supra. She has conceded that the New York decree was simply a custody decree involving a minor child, and that "full faith and credit" thus is inapplicable.

Efforts now to treat the New York decree differently, so as to bring into play the "full faith and credit clause" come too late; *Robertson & Kirkham, Jurisdiction of the Supreme Court of the United States* [1951 Ed.], §§ 65-82, and cases cited.

So much for the "full faith and credit" clause argument.

II. NO VIOLATION OF DUE PROCESS SHOWN IN FLORIDA PROCEDURE; FULL HEARING ON BEST INTERESTS AND WELFARE OF CHILD WAS HAD AND ISSUES FULLY WERE LITIGATED WITH ALL INTERESTED PARTIES BEFORE THE COURT; NO SUCH CONSTITUTIONAL ARGUMENTS WERE RAISED BELOW AT ANY TIME IN ANY EVENT.

1. *Due Process Afforded to Petitioner*

The petitioner urges in reality that the best interest of the child is automatically subservient to her rights as natural mother of the illegitimate child, and that she somehow automatically was deprived of due process here, in a custody dispute which resulted in continued custody in the foster parents.

In a very similar situation, in *Painter v. Bannister*, 258 Iowa 1390, 140 N.W.2d 152, cert.den., 385 U.S. 949, the Iowa Court ruled that the best interest of the child there involved dictated that the custody remain with grandparents in the Mid-West.

The father — like the mother here — had voluntarily surrendered custody to the grandparents after his wife died. After the passage of time, he remarried and sought to regain custody.

His environment was somewhat "Bohemian". The grandparents were possessed of solid values and lifestyle. There was testimony by experts — as here — that transfer of the child's custody back to the father would be harmful.

The Iowa courts awarded custody — in the best interest of the child — to the grandparents, notwithstanding the natural right of the natural parent, because the child's welfare was the main consideration. Great value was afforded the expert testimony. The analogies between *Painter* and this case need hardly be further described.

This Court denied a petition for a writ of certiorari, 358 U.S. 949, in *Painter*. There is no more reason to grant the petition here.

No due process clause violation, or any other constitutional violation can be demonstrated by a decision based on the child's best interest and welfare, as opposed to the rights of the natural parent, no matter how strong those rights are in the abstract. The child's welfare is supreme. This always has been and will be the law regardless of the identity of the contestants.

2. *Florida Procedure Affords Full Hearing on All Issues in Cases Like This; Right of Natural Parent Given Great Weight, But Falls to Best Interest of Child — No Violation of Due Process.*

Under the law of Florida, the child's welfare is the crucial issue in a child-custody habeas corpus proceeding between the natural mother of an illegitimate child and the foster parents. Since this is so, the evidence and record below virtually mandated that custody continue in the DeMartinos, and the writ properly was discharged, the petition denied, and custody remanded to the DeMartinos — *as they sought in their return.*

The Petition for a writ of habeas corpus alleges illegal detention of the child against the desires of the natural mother. It does not even suggest that the child's welfare requires custody in her. As a matter of fact, the crucial issue, as raised by the Return and Response was not the mere wishes of the mother, but rather the "best welfare" of the child. This was the issue tried below in the Florida Court.

Here of course the DeMartinos legally secured custody of the child in the first instance. That custody was summarily determined — as to them — in New York, without any semblance of opportunity to be heard; and without any meaningful adversary trial on any issue, let alone the welfare of the child.

The law of Florida is well defined, clear, and not subject to dispute, despite the contrary argument in the petition (page 22). In a situation such as this the DeMartinos had to be afforded a full opportunity to develop what was best for the child and certainly the Florida courts repeatedly have so held.

The leading case directly applicable here, cited below, (Appendix B), is *Arnd't v. Prose*, Fla. 1957, 94 So.2d 818. The case is strikingly similar to this one. It was a habeas corpus case in which — just like Miss Scarpetta here — the natural mother attempted to obtain custody of her illegitimate child. And just like Miss Scarpetta here, the mother alleged that she was the natural mother of the child and that the respondents were unlawfully holding him.

The facts revealed that the natural mother had voluntarily turned custody of the child over to the father's sister. The father of the child, at the mother's request, placed custody of the child with his sister and her husband. The foster parents had no actual legal claim to the child in any technical sense. That was just like the situation here.

Sometime later the natural mother instituted habeas corpus proceedings. *The trial judge refused to hear any evidence on the best welfare of the child and held that since the foster parents had no legal right to the custody of the child and the natural mother had such a right, it had no alternative but to remand the child to the custody of his mother.*

The Florida Supreme Court reversed and in an opinion by Justice Roberts, directly applicable here, said:

> At the hearing on the writ and the answer thereto, the trial judge refused to hear any evidence on the question of the welfare of the child or his desires in the matter, it being his view that since Mr. and Mrs. Arnd't's answer had shown no legal right to the custody of the child and since the appellee, as his natural mother, had a clear legal right to his custody, he had no alternative but to remand the child to the custody of his mother. He did so, and Mr. and Mrs. Arnd't have appealed.
>
> We think the learned trial judge overlooked the holding of this court in Maddox v. Barr, 49 Fla. 182, 38 So. 766, that in a habeas corpus proceeding involving the custody of a child 'the law is not

so much concerned about the illegality of the detention as the welfare of the child*** It was further said as to such proceedings that

'The court, when asked to restore an infant, is not bound by any mere legal right of a parent or guardian but is to give it due weight as a claim founded on human nature, and generally equitable and just. The court is in no case bound to deliver a child into the custody of any claimant, but should, in the exercise of a sound judicial discretion, after a careful consideration of the facts, leave it in such custody as the welfare of the child at the time appears to require.'

This rule has been followed in other cases involving the claim of a parent or legal custodian to the custody of a child as against the claims of third persons.

* * *

Accordingly, the order remanding the child to the custody of the appellee must be reversed under the authority of the above cited cases, and the cause is remanded for further proceedings.

Reversed and remanded. (94 So.2d at 819)

That case and language govern these proceedings like a glove. Consideration of the best interests of the child at a hearing obviously supported the order of continuing custody in the DeMartinos and the discharge and denial of the habeas corpus proceedings, and the affirmance below.

But there are Florida cases even closer. In *Fielding v. Highsmith*, 152 Fla. 887, 13 So.2d 208, also cited below, an adoption proceeding was ruled invalid *because consent was not procured from the natural parent nor was notice given him of the adoption proceedings.*

On habeas corpus, the father challenged the adoption; and the trial court found that he was fit and proper as a father and awarded him the custody of the child.

On appeal the Florida Supreme Court reversed. The court held that although the adoption was invalid as a matter of law, nevertheless the foster parents who were absolute strangers to the blood, were entitled to possession in the best interests of the child on the entire record and facts presented. After holding the adoption invalid as a matter of law, the court said, in part controlling here, the following:

> It does not necessarily follow from this holding, however, that the custody of the child must go back to the father in all events. This is a habeas corpus proceeding brought primarily to determine the custody of a minor child, even though in the process the validity of the adoption proceedings is incidentally involved. In such proceedings the moral, intellectual and material welfare of the child are the matters of chief importance, Bourn v. Hinsey, 134 Fla. 404, 183 So. 614, and the infant should be placed where its interest will be best subserved, without regard to the validity or invalidity of the adoption proceedings.

Of course, all things being equal, the legal right of the father will generally prevail. But the rights of the parent are not absolute; many other factors must be taken into consideration. 'The ties of nature and of association, the character of the applicant for the child, its age, health, and sex, the moral or immoral surroundings of its life, the benefits of education and development, and pecuniary prospects, as well as many other considerations, enter into the judicial determination.' Marshall v. Reams, 32 Fla. 499, 14 So. 95, 96, 37 Am.St. Rept. 118 (13 So.2d at 209)

* * *

From a critical study of the testimony in the case, we have no hesitancy in arriving at the conclusion that the moral, intellectual, and material welfare of the child will be best subserved by allowing it to remain with the foster parents. (13 So.2d at 210)

The doctrine of *Fielding v. Highsmith* was of course applied in the controlling *Arnd't* case. *Fielding* shows that where, as here, for some technical reason, a potential adoption fails, nevertheless custody does not automatically revert to the natural parent. To the contrary the best interest of the child is paramount.[4]

Manifestly, the case and its legal doctrine required affirmance here — because here, as in *Fielding*, the infant's interest will be best subserved.

---

[4]Also, in FIELDING, the would-be adoptive parents had another child—just like the DeMartinos do here. The relationship between that child and the child involved was referred to in the court's opinion.

Remarkably, there is yet even a closer case. In *McKinney v. Weeks*, Fla.App. 1961, 130 So.2d 810, cited below, the infant, like Lenore, was born out of wedlock. As here, the mother filed a habeas corpus proceeding in Florida notwithstanding her prior execution of the consent to adoption. The respondents, like the DeMartinos, were husband and wife, and apparent complete strangers to the blood. They gained custody of the infant *only three weeks prior to the commencement of the habeas corpus proceedings. And their identity was disclosed to the petitioner for the first time only upon the filing of the petition.*

The habeas corpus proceeding alleged, and the proof showed, that the consent was invalid under the law of Florida for technical reasons because it was not witnessed properly. The trial court entered judgment adverse to the mother, but the Second District Court of Appeal reversed because the consent was invalid. The court did not, however, automatically direct that custody be given to the mother. To the contrary, the court, citing the *Fielding* case and the *Arnd't* case, stated in language again controlling here as follows:

> Although a reversal must be entered herein, a remand for further proceedings is indicated. *Nowhere in the record before us does it appear that there was an inquiry into the child's welfare.*
>
> 'Where a writ of habeas corpus is prosecuted for the purpose of determining the right to the custody of a child, the controversy does not involve the question of personal freedom, because an infant, for humane and obvious reasons, is pre-

sumed to be in the custody of someone until it has obtained its majority. The court, in passing on the writ in a case involving the custody of a child, deals with a matter of an equitable nature; it is not bound by any mere legal right of parent or guardian, but is to give either parent's claim to the custody of the child due weight as a claim founded on human nature and generally equitable and just. Therefore, these cases are decided not on the legal right of the petitioner to be relieved from unlawful imprisonment or detention, as in the case of an adult, but on the court's view of the best interest of those whose welfare required that they be in custody of one person or another. Hence, a court is not bound to deliver the child to any claimant, but should leave it in such custody as the welfare of the child at the time appears to require. In short, although the natural rights of the parents are entitled to due consideration, the child's welfare is the supreme consideration, irrespective of the rights and wrongs of its contending parents.'

15 Fla.Jur., Habeas Corpus §62. Reference is also made to Fielding v. Highsmith, 152 Fla. 837, 13 So.2d 208, whereupon habeas corpus an order of adoption was found invalid, and to Arnd't v. Prose, Fla. 1957, 94 So.2d 818, where evidence was refused by trial judge on the question of the welfare of the child.

A closer analogy between cases could not exist than the analogy between *McKinney* and this case. The failure of the consent of itself simply does not mean that the

mother is entitled to custody. Rather a full adversary hearing on the best interests of the child is required. That hearing has been had, and there can be little doubt where those interests best rest.

Another case virtually controlling here and almost exactly like it, is *Robertson v. Bass*, 52 Fla. 420, 42 So. 243, cited below. See also *Day v. Nelson*, Fla.App. 1968, 213 So.2d 491, and see *State ex rel. Weaver v. Hamans*, 1935, 118 Fla. 230, 159 So. 31 (and cases cited); *State ex rel. Hicks v. Cain*, 1948, 160 Fla. 680, 36 So.2d 275; see also *Witt v. Burford*, 84 Fla. 204, 93 So. 186; *Hancock v. Dupree*, 100 Fla. 617, 129 So. 822 (welfare of child governs in child-custody habeas corpus proceeding, and not technical legal right to custody); *Crane v. Hayes*, Fla. 1971, 253 So.2d 435, 440 (parent's right subordinate to child's welfare).

In a similar case, *State ex rel. Weaver v. Hamans*, supra, 159 So. 31, a mother had voluntarily turned over one of her children to foster parents—at least until the child finished her education. Affirming a remand of custody to the foster parents, on a second petition for habeas corpus the Florida Supreme Court—again in language directly applicable here, quoted the trial court's findings and said:

> Further in the judgment the court says:
>
> 'This is a sad case and a case which this court would much prefer not to be called on to decide. I doubt if even the wisdom of Solomon himself could settle this problem, because I have no doubt that both the respondents and the petitioner love

the child. Of course there were many considerations from all of the evidence, introduced in the previous trial which entered into the Court's judgment remanding the child to the custody of the respondents. I cannot but conclude, in view of all of the evidence and my observation of the parties, both in and out of the court room, and my observation of the child in the court room, and the actions of the child with reference to the petitioner and the respondents, and of the actions of the parties towards and with reference to the child, that in spite of the fact that the petitioner loves the child with a mother's love, having been separated from the child more than two years, she cannot and would not be hurt as much by allowing the original judgment in this cause to stand as would the respondents. *I have no doubt that the respondents are more closely attached to the child at this stage than is the petitioner, and, of course, the child is completely attached to the respondents, and it seems to me that while it is a bad situation either way, and the Court realizes that the mother loves the child and would like to have it with the other children, that nevertheless in view of all the circumstances, it would be a far greater tragedy to society and to the parties involved, and especially to the child and the respondents, to take the child away from them and award it to the petitioner than it would be to leave the child where she is.* From a humane standpoint, the court is convinced that the lapse of the additional year has greatly increased the necessity for leaving the child with the respondents to avoid the greatest tragedy. *My disposition, under ordinary*

circumstances, as is the disposition of all courts, is to leave the child with its mother or father, but the circumstances of this case are such that I cannot bring myself to the conclusion that I could or would take the child from the respondents, under all the circumstances of this case, and particularly when I consider the judgment which this court heretofore entered in a proper and complete trial of this cause on the merits, at which time the court carefully went into the whole matter and definitely decided the case.'

The evidence disclosed by the record abundantly sustains the conclusions reached by the trial judge, and following the rule which we enunciated in the case of Witt et al. v. Burford, supra, and Hancock v. Dupree, supra, we must affirm the judgment. It is so ordered.

Affirmed. (159 So. at 33)

As in *Hamans*, there can be no doubt where Baby Lenore's best interest rests.

The evidence construed in the light most favorable to the DeMartinos—as it must in a child custody case at this stage of the proceedings (see *Mirras v. Mirras*, Fla.App. 1967, 202 So.2d 887, 893; *State ex rel. Weaver v. Hamans*, supra, 159 So. at 33), was more than sufficient to support the determination.

The psychiatric and expert testimony alone shows the damage a transfer would inflict. See, *Painter v. Bannister*, supra. The baby—on top of the problems attendant to a transfer from the only parents it has ever known, would

be brought up on a New York apartment, basically by a 65 year old non-English speaking maid; without a father, or sister, or all around family situation. Olga Scarpetta—for whom we feel deep sympathy—created her own problems. The baby must not suffer for them. The *baby* is the consideration—as is her welfare.

The cases cited by the petitioner are inopposite: *In re Vermuelen's Petition*, Fla.App. 1959, 114 So.2d 192, merely holds that where one parent unlawfully and unilaterally takes a child and places it with others, against the will of the remaining fit and competent parent, the remaining parent does not have to vie for custody of the child on an equal footing with strangers. A primary consideration in *Vermuelen* was the court's determination that:

> We cannot close our eyes, however, to the grave injustice which has been done appellant where through no fault of his own he . . . has been deprived of living together in the family relationship . . .

Even that case recognizes the overriding consideration—the baby's welfare.

The case has nothing to do with this one, where Olga Scarpetta voluntarily surrendered her child; and where technical legal custody in the DeMartinos resulting from that consent lawfully continued until at least May of 1971, even under the New York law—which is not binding here—when the stays ended. Those stays, of course, were not even sought by the non-party respondents. And at their expiration, the child already was almost a year old and well into the critical non-transfer period. In the light of

Arnd't, supra; *Fielding*, supra; *McKinney*, supra; and *Hamans*, supra; a factual comparison between *Vermeules* and this case is like a comparison between apples and airplanes.

Where a surrender or abandonment is voluntary and unqualified in its inception, all of the cases teach us that the natural right of the parent no longer is absolute. *No one says that it is not entitled to substantial consideration*, which the courts below did not dispute, but it is subordinate to the child's best welfare. Custody then depends primarily upon the child's best welfare even in a suit between the surrendering parent and strangers who have obtained lawful custody in the interim—although the rights of the natural parent must be given due consideration. This is just such a case; and on all the evidence and logic and common sense as well, custody was awarded to the DeMartinos. No violation of due process exists.

3. *Claim of Violation of Due Process Clause Not Raised Below.*

Pages 11-12 of the Petition purport to show preservation of a claim of deprivation of due process in the trial court. Yet a simple reading of the matter to which reference is made shows not a *hint* of such a contention.

Nor is it even claimed, nor can it be, that *any* due process point was asserted on appeal at any stage thereafter. A clearer case of waiver of a constitutional point by failure to raise it in the State Appellate Court could not exist. *Robertson & Kirkham*, supra [1951 Ed.] §70, and cases cited.

III. WRIT OF CERTIORARI SHOULD NOT BE GRANTED WHERE NO SPECIAL REASONS AS CONTEMPLATED BY RULE 19 EXIST, AND THE MATTER INVOLVES ONLY A DETERMINATION OF CHILD'S BEST WELFARE ON UNIQUE FACTS, ON AN EXTENSIVE RECORD, IN A UNIQUE "EPISODIC" CASE.

The decisions below do not decide a federal or constitutional question properly preserved; nor pass on a federal or constitutional question not previously determined by this court, nor in a manner probably not in accord with applicable decisions of this Court. None of the indicia for the granting of a writ, as contemplated by Rule 19, of the Rules of the Supreme Court of the United States, are present.

There is a mass of documentary evidence and testimony supporting the Florida decree. The determination lawfully was made after a full adversary proceeding. The decree was properly affirmed. The petitioner here seeks in reality, only to "review evidence and discuss specific facts," and to challenge a finding on a unique factual record, *United States v. Johnston*, 268 U.S. 220, 227, 45 S.Ct. 496-97 (1925), in the guise of this Petition for a Writ of Certiorari. To warrant Rule 19 attention, the issues must be "beyond the academic or the episodic." *Rice v. Sioux City Memorial Park Cemetery*, 349 U.S. 70 (1955).

This simply is not a case where certiorari is warranted or required. It is a unique case, involving a unique set of

circumstances. The law is settled both procedurally and substantively in matters of this kind. Finally the constitutional issues advanced are without merit and were not properly preserved anyhow.

The best welfare of "Baby Lenore" has been determined. It would be a travesty now, after the passage of so much time, to wrest the child away from the only family and parents she has ever known.

VI

CONCLUSION

No reason has been shown to grant the writ here sought. The petition for a writ of certiorari should be denied.

Respectfully submitted,

BILL COLSON
Attorney for Respondents

ROBERT ORSECK, *of Counsel*

COLSON & HICKS, P.A.
Second Floor, Concord Building
Miami, Florida 33130

PODHURST ORSECK
& PARKS, P.A.
Second Floor Concord Building
Miami, Florida 33130

FUCHSBERG & FUCHSBERG
250 Broadway
New York, New York

of Counsel

VII

CERTIFICATE OF SERVICE

I HEREBY CERTIFY THAT on this ____ day of October, 1972, three copies of this Brief of Respondents were mailed, postage prepaid to the following attorneys of record:

ZALK RUBEL & PERRET
608 Fifth Avenue
New York, New York

ROSENBLATT and ROEMER, P.A.
HORTON SCHWARTZ & PERSE
66 W. Flagler Street
Miami, Florida 33130

Attorneys for Petitioner

I FURTHER CERTIFY that all parties required to be served have been served.

BILL COLSON
Attorney for Respondents

ROBERT ORSECK, *of Counsel*
COLSON & HICKS, P.A.
Second Floor, Concord Building
Miami, Florida 33130

PODHURST ORSECK
& PARKS, P.A.
Second Floor, Concord Building
Miami, Florida 33130

FUCHSBERG & FUCHSBERG
250 Broadway
New York, New York

of Counsel